Digest and Decisions of the Employees' Compensation Appeals Board

U.S. Department of Labor
Employees' Compensation Appeals Board
October 1, 1987 - September 30, 1988

Volume 39 - Book 2

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Digest and Decisions of the Employees' Compensation Appeals Board

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U.S. Department of Labor
Ann D. McLaughlin, Secretary

Employees' Compensation Appeals Board

Members of the Board:
Michael J. Walsh, Chairman
George E. Rivers
David S. Gerson

Alternate Board Members:
Michele von Kelsch
Willie T.C. Thomas

October 1, 1987 - September 30, 1988

Volume 39 - Book 2
(Cite as 39 ECAB)

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PREFACE

The Employees' Compensation Appeals Board was established in 1946 as a three-member, quasi-judicial body within the Federal Security Agency in accordance with the provisions of Reorganization Plan No. 19 of 1946, effective July 16, 1946.

Reorganization Plan No. 19 of 1950, effective May 24, 1950, provided for the transfer of the Board and its functions to the Department of Labor, and the transfer to the Secretary of Labor of the functions of the Federal Security Administrator with respect to the Board.

The Board has authority to hear and, subject to applicable law, make final decisions on appeals taken from determinations and awards with respect to claims of employees of the Federal Government arising out of the Federal Employees' Compensation Act of 1916, as amended and extended.[1] The Board's jurisdiction is strictly appellate in nature and extends to questions of law and fact and to questions concerning the exercise of discretion. The review is made upon the case record. New evidence is neither received nor considered by the Board.

The administration of the Federal Employees' Compensation Act is the responsibility of the Office of Worker' Compensation Programs which, prior to July 2, 1974, was known as the Office of Federal Employees Compensation.[2]

The decisions reported in this volume were issued during the period from October 1, 1987 to September 30, 1988. This volume contains only those cases having precedential value. Routine cases which follow earlier established precedents have not been included. Likewise, most of the Board's orders (decisions issued without opinions) have been excluded. The majority of these orders set aside the decisions of the Office of Workers' Compensation Programs in the particular case and remanded it, either on the Board's own initiative or on motion of the Office, to correct legal or procedural error or for further development from an evidentiary standpoint.

The Board has continued the practice begun in Volume 35 of combining the decisions and index digest into a single, consolidated volume. The current index digest section follows as closely as possible the format and topic headings of the original index digest. This section is composed of headnotes to the printed decisions. These headnotes are not to be regarded as adding to or modifying the results or text of the decisions in any manner. They are intended merely as a tool to assist in the use of the volume.

Docket numbers are assigned on a fiscal year basis. Thus 88-01 was the first case filed in fiscal year 1988, which commenced on October 1, 1987.

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[1] Title 5, United States Code, section 8101 *et seq.* With respect to employees of the District of Columbia Government, effective May 3, 1979, all functions previously performed by the Secretary of Labor and the Employees Compensation Appeals Board under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*, were transferred to the Mayor of the District of Columbia.

[2] In the case of employees of the Canal Zone Government and of the Panama Canal Company, the administrator was the Governor of the Canal Zone. However, effective October 4, 1979, Title 5 United States Code 8101 *et seq.* became inapplicable to any individual (1) who is not a citizen of the United States, (2) whose initial appointment by the Commission occurs after October 1, 1979; and (3) who is covered by the Social Security System of the Republic of Panama pursuant to any provision of the Panama Canal Treaty of 1977 and related agreements. Sec. 1209(a), P.L. 96-70; 93 Stat. 463.

Decisions of the Employees' Compensation Appeals Board

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WOODS, John H., Jr. and U.S. Postal Service, Post Office, Knoxville, TN	88-0675	971
WYNECOFF, Sallie B. and U.S. Department of Education, Credit and Debt Management Research, San Francisco, CA	86-2103	186
YAZZIE, Johnson K. and Department of the Interior, Bureau of Indian Affairs, Shiprock, NM	87-1605	701
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ZERRILLO, William D. and Department of Justice, U.S. Marshals Service, McLean, VA	86-1266	525

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[1] Docket numbers are assigned on a fiscal year basis. Thus 88-1 was the first case filed in fiscal year 1988, which commenced on October 1, 1987

In the Matter of DAVID E. FISHBACK *and* DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Boise, Ida.

Docket No. 88-612; Submitted on the Record;
Issued April 29, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has more than a five percent permanent impairment of his left lower extremity for which he received a schedule award.

This is the second appeal in this case to the Board. The Board's decision and order of July 27, 1987 set forth the relevant facts and circumstances of the case and is hereby incorporated by reference.[1] In the prior decision the Board found the case was not in posture for decision on whether appellant had more than a four percent permanent impairment of his left lower extremity. The Board remanded the case to the Office of Workers' Compensation Programs to request clarification of the report of Dr. Sidney J. Garber, a Board-certified orthopedic surgeon, selected by the Office to examine appellant and provide an opinion on the nature and extent of any employment-related impairment of the left lower extremity. The Board noted that Dr. Garber should be asked to provide a further description of appellant's impairment and be asked to utilize Chapter Two of the American Medical Association's *Guides to the Evaluation of Permanent Impairment.*[2]

On remand, the Office requested Dr. Garber to clarify his medical report. In a report dated September 14, 1987 Dr. Garber noted that he reviewed Chapter Two of the A.M.A. *Guides* and stated: "I originally used the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment and my feelings are the same. According to the American Medical Association's *Guides* based on his present findings he [appellant] would have [a] 62 percent loss of the lower extremity which converts to 25 percent [of the] whole person. . . ."

On September 23, 1987 an Office medical adviser reviewed Dr. Garber's medical report and concluded that appellant had a five percent permanent impairment of his left lower extremity. In arriving at his conclusion, the Office medical adviser noted that under Chapter Two of the A.M.A. *Guides* Table 6 provides for rating of spinal nerve root impairment and allows a maximum of five percent for loss of function due to sensory deficit, pain or discomfort. The medical adviser then referred to Table 4 which provides a grading scheme and procedure for determining the impairment of an affected body part due to pain, discomfort, or loss of sensation. He noted that description number three of Table 4 provided a grade of 30 percent to 60 percent for decreased sensation with or without pain which interferes with activity. The medical adviser allowed the maximum of 60 percent for appellant's left lower extremity [60 percent of five percent] to arrive at three percent impairment due to pain, discomfort and loss of sensation. The medical adviser then referred to Table 5 of the *Guides* which provides a grading scheme and procedure for determining impairment of an affective body part due to loss of strength. The medical adviser noted that description number two of Table 5 allows a grading of five percent to 20 percent for a complete range of motion against gravity and some resistance or reduced fine movements and motor control. The medical adviser noted that in evaluating loss of strength at the site of the L5 nerve root, Table 6 of the *Guides* allows a maximum 37 percent loss due to loss of strength. He noted that Dr. Garber's reports indicated that appellant's strength in the left lower extremity was normal. For this reason, he allowed 20 percent from Table 6 for loss of strength and graded it under Table 5, allowing 10 percent (10 percent of 20 percent) to arrive at two percent for loss of strength of appellant's left lower extremity. The medical adviser noted that Dr. Garber's reports showed that appellant's gait was normal, that he had restriction and mild pain on flexion to 80 degrees and no pain at rest or ordinary activity. Appellant's reflexes, sensation and pulses were also reported as normal. The medical adviser noted that Dr. Garber's physical findings indicated very little actual impairment of the left leg and for this reason the medical adviser's estimate of the extent of physical impairment was at a wide variance with that provided by Dr. Garber.

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[1] 38 ECAB 654 (1987).

[2] The American Medical Association's *Guide to the Evaluation of Permanent Impairment* have been adopted by the Office, and the Board has concurred in such adoption, as a standard for the evaluation of schedule losses. *See Ronald J. Pavlik,* 33 ECAB 1596 (1982).

On October 8, 1987 the Office issued appellant a schedule award for five percent permanent impairment of the left lower extremity. The period of the award ran from July 9, 1985 to October 17, 1985, less the four percent previously awarded.

The Board finds that appellant has no more than a five percent permanent impairment of his left lower extremity for which he received a schedule award.

In the prior appeal, the Board remanded the case to request Dr. Garber to clarify his medical opinion on the description of appellant's physical impairment and to provide a description of appellant's impairment under the A.M.A. *Guides*. The Office requested Dr. Garber to clarify his opinion, and received a September 14, 1987 response in which Dr. Garber stated that he had reviewed the *Guides* and concluded that appellant had a 62 percent impairment of the left lower extremity. The Board notes that Dr. Garber's supplemental report did not provide any rationale for his stated conclusion and did not provide any specific reference to the A.M.A. *Guides* as he was requested to do at the time of the prior appeal. Because Dr. Garber's report was not complete, the Office properly referred the case record to an Office medical adviser for computation of the percentage of impairment.[3]

The Office medical adviser properly reviewed the reports of Dr. Garber which included a description of his findings on physical examination of appellant. Based on these findings, the Office medical adviser made specific reference to Chapter Two of the *Guides* (as set forth above) to reach his conclusion that appellant had a five percent permanent impairment of his left lower extremity. Appellant has not submitted any evidence which would indicate that he has more than a five percent permanent impairment for which he received a schedule award. As the report of the Office medical adviser is the only report of record which is in conformance with the A.M.A. *Guides*, the Office properly based appellant's schedule award on his September 23, 1987 report.

The October 8, 1987 decision of the Office of Workers' Compensation Programs is affirmed.

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[3] *See* Federal (FECA) Procedure Manual, Chapter 2-808, Developing of Permanent/Schedule Disability Claims, paragraph 7(c)(3) (December 1983).

In the Matter of AZALEE L. MCCOY *and* U.S. POSTAL SERVICE, POST OFFICE, Santa Ana, Calif.

Docket No. 87-1335; Submitted on the Record;
Issued April 29, 1988

Re: Attorney's Fee

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to approve an attorney's fee.

Richard P. Fox, Esquire, Los Angeles, California, the employee's representative before the Office, requested approval of a fee in the sum of one thousand four hundred and fifty dollars ($1,450.00) for 14.50 hours of work performed on behalf of the employee in claim numbers A13-782763, A13-749077, and A13-749606. The time listed was for all three claims and was not itemized separately for each claim.

In a subsequent letter dated September 8, 1986 the attorney suggested that appellant's claims A13-782763, A13-749077, A13-749606, A13-803039, and A13-687394 be consolidated because of the plethora of claims the employee had submitted.

By letter dated September 23, 1986 the Office informed the attorney that he needed to provide an itemized bill for each referenced case. By letter dated October 2, 1986 the attorney objected to providing an itemized bill for each case, stating that frequently time could not be broken down because it was spent on more than one case. The attorney enclosed a copy of a September 3, 1986 statement signed by the employee agreeing with the requested fee.

By letter dated December 18, 1986 the Office informed the attorney of its policy not to consolidate cases unless it is necessary for the adjudication of the case. The letter explained that consolidating cases is rarely done except when "considering cases with separate injuries resulting in the same medical condition, when long term disability from this condition is being adjudicated and the entire case record must be looked at by a medical examiner." The letter noted that three of the employee's cases, which included A13-738184, A13-73474, and A13-687394, which were all orthopedic claims, were consolidated into one master number, A13-687394. The letter further stated that since other claim numbers were regarding different types of injuries it would not consolidate the cases, therefore it would not consider a combined fee request.

When a separately itemized statement for each claim number was not submitted, the Office by decision dated March 27, 1987 rejected the attorney's request for approval of a fee in case number A13-782763 because of his failure to provide a separate and individual fee request for each case.

By decision dated April 29, 1987 the Office rejected the attorney's request for approval of a fee in case numbers A13-687394, A13-738184, and A13-739474 on the basis that he failed to submit an appropriate itemization of his services for each of the cases.

The attorney appealed to the Board stating that the necessary work performed for the employee entailed consolidation of the numerous claims that the employee had filed, and that there was no requirement that he file a separate fee request for each claim number.

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on the criteria set forth in 20 C.F.R. section 10.145 and mandated by Board decisions. The Board's function is to determine whether the action by the Office constituted an abuse of discretion.[1]

The record reveals that the attorney requested a combined fee for three claims filed by appellant, claim numbers A13-782763, A13-749077, and A13-749606. The Office informed the attorney that claim number A13-782763 was for a bronchial condition filed on November 20, 1985 and accepted by the Office; claim number A13-749077 was filed on November 15, 1984 for excruciating pain in the joint of the right shoulder; and claim number A13-749606 was filed on August 15, 1984 for "stress, tension headache, colitis, extreme dizziness, nausea, incoordination, muscle spasms, and disorientation." Because the three claims were for different unrelated conditions the Office informed the attorney that it would not consolidate the claims.

The Office's regulations pertaining to attorney fees provides: "In every case where a representative's fee is desired, an application for approval of the fee shall be made to the Office . . . . Each request for approval of a fee shall be accompanied by a complete itemized statement . . . describing the services rendered." [2]

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[1] *William Lee Gargus*, 25 ECAB 187 (1974).

[2] 20 C.F.R. section 10.145(c).

The Office informed appellant that it could not adjudicate his fee request unless he submitted a separate itemization of time for each claim. The Office further explained why it did not consolidate the employee's three files. In order for the Office to determine whether a requested fee is reasonable for services rendered the Office must compare the requested fee to the appropriate file.[3] Since appellant did not submit an itemization where such a comparison could be made, the Office did not abuse its discretion by refusing to approve an attorney's fee.

The Board finds that the action of the Office in refusing to approve an attorney's fee was not, as a matter of law, arbitrary or unreasonable and did not constitute an abuse of discretion.[4]

The March 27, 1987 and April 29, 1987 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

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[3] *See George Lanzy*, Docket No. 85-166 (issued March 28, 1985).

[4] *See Hazen J. Jones*, 26 ECAB 348 (1975), and cases cited therein.

In the Matter of LAWRENCE M. NELSON *and* DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, Yakima, Wash.

Docket No. 87-1994; Submitted on the Record;
Issued April 29, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has more than a 34 percent employment-related loss of wage-earning capacity effective November 15, 1981.

On April 28, 1970 appellant, then a 38-year-old criminal investigator, filed a claim alleging that he sustained an injury to his neck, back and head when his vehicle was involved in an accident.

On April 22, 1974 appellant filed a claim for recurrence of disability stating that he had had a continuing problem with headaches, neck and back pain and dizziness since April 23, 1970 which had gotten progressively worse. Appellant indicated that he had retired on disability effective December 28, 1973. On September 13, 1974 the Office of Workers' Compensation Programs accepted appellant's claim for "cervical lumbar strain, hyperextension and hyperflexion strains and sprains of the neck and back, traumatic myofascitis." Appellant began to receive compensation for temporary total disability.

On March 7, 1977 appellant was referred to Dr. James M. Lansche, a Board-certified neurological surgeon, for a current evaluation.

In a report dated March 28, 1977 Dr. Lansche stated that appellant described continued symptoms with no objective evidence of neurological abnormality. Dr. Lansche saw little difference in his neurological situation from that time when appellant received his medical discharge.

The Office referred appellant to Dr. Josel L. Seres, a Board-certified neurological surgeon. Dr. Seres reported in a multidisciplinary summary dated July 19, 1977 that appellant appeared to be interested in maintaining his present status quo on undergoing any further medical treatment that would maintain that situation, rather than accepting a smaller financial return for retirement. Dr. Seres recommended a pain program to deal with appellant's pain and noted that his prognosis for return to work was poor to moderate.

On September 15, 1977 an Office medical adviser reviewed the case record and concluded that there was little evidence that appellant could not do some form of work with his former agency.

In a letter dated November 3, 1977 the Office notified appellant that the medical evidence showed that he was no longer totally disabled for work and that it must determine his wage-earning capacity in his partially disabled condition.

In response to a CA-1654a questionnaire, appellant stated that he worked as a part-time security guard for $4.21 per hour for 16 hours per week. In a letter dated December 29, 1977 appellant indicated that he had begun work on September 12, 1977 and his duties included patrolling the plant by foot, the outer area by vehicle, and checking identification at the entry gate. In a form CA-1027 appellant's employer stated that appellant earned $183.00 per week for 40 hours as a part-time security guard since September 1977.

An Office medical adviser concluded on February 23, 1977 that appellant was capable of performing the duties of his position as security guard given his April 23, 1970 injury.

Comparing the pay rate of a "watchman" with the current rate of the job which appellant held when injured, the Office determined that he had a 59 percent loss of wage-earning capacity. In a letter dated March 13, 1978 the Office informed appellant of the above determination.

On February 13, 1980 the Office referred appellant again to Dr. Lansche for a current medical evaluation. In a report dated March

26, 1980 Dr. Lansche concluded that symptomatically appellant remained the same as his last examination in 1977 with no objective evidence of difficulty in the central nervous system.

In a form CA-1032 dated December 18, 1981 appellant indicated that on his job as a watchman he earned $260.00 per week from January 1, 1981 to March 10, 1981, $308.00 per week from March 11, 1981 to June 1, 1981 and as of June 1, 1981 he earned $369.00 per week.

In a letter decision dated February 19, 1982 the Office advised appellant that the information contained in his CA-1032 indicated that he had earned progressively higher wages since 1977 which was persuasive evidence that he had been vocationally rehabilitated and therefore his loss of wage-earning capacity rating should have been updated. The Office adjusted appellants rate effective February 25, 1982.

In a memorandum of a telephone call dated March 16, 1982 appellant stated that he did not earn $185.00 per week for 40 hours a week and submitted evidence which indicated that he earned an average of $74.93 per week from September 11, 1977 to April 9, 1978.

In a letter dated September 7, 1982 the Office informed appellant that there had been an error in his initial loss of wage-earning capacity determination based on erroneous information supplied by his employer at the time and that his compensation would be adjusted.

Appellant's employer submitted the following information regarding appellant's earnings:

"Date	Job	Earnings
March 1, 1981	Plant Guard	$1,340 per month.
May 24, 1981	Senior Plant Guard	$1,600 per month.
November 15, 1981.	Chemical Technician.	$1,600 per month.
May 1, 1982	Chemical Technician.	$1,830 per month.
August 1, 1983	Chemical Technician.	$1,940 per month."

In a letter dated June 20, 1985 to appellant's employer, the Office asked whether appellant had received any formal/informal training since February 1982 and whether his experience gained since February 1982 had provided him with more skills to qualify him for higher earnings.

In a letter dated June 25, 1985 appellant's personnel supervisor, Mr. A. C. MacKay, stated the following:

> "(1) Mr. Nelson has received no formal/informal training for his position as a Laboratory Technician since the date mentioned in your letter.
>
> "(2) Each of our salaried employee's performance is reviewed each year and based on his/her job performance and their positions in their salary grade, their salary is adjusted. Naturally it is expected that an employee's experience will improve his/her skills which in turn would qualify for a salary increase."

In a letter decision dated July 24, 1985 the Office advised appellant of the following:

> "A compensation award remains in place without adjustment unless an employee is rehabilitated and earns a higher wage rate as a result of that rehabilitation.
>
> "Your employer, FMC Corp., has advised this Office that as a result of on-the-job experience gained since your employment in 1982 you are qualified for a higher rate of pay. Your employment with FMC is considered a form of self-rehabilitation.
>
> "Therefore, your compensation rate is being adjusted as per Form CA-1048 which is forthcoming."

By letter dated August 24, 1985 appellant requested a hearing.

By compensation order dated October 3, 1985 the Director vacated the Office decisions dated July 24, 1985 and February 19, 1982. The Director stated in a memorandum dated October 7, 1985 that the adjustment made on February 19, 1982 was based on appellant's progressively higher wages since 1977 which was an improper reason upon which to base an adjustment. The Director further stated that the employee's June 25, 1985 letter did not show any additional qualifications obtained for the increase of wages since 1982 and therefore that adjustment made in July 1985 was also improper. He stated that the only basis for possible adjustment after the original loss of wage-earning capacity determination in September 1977 was appellant's job change from guard to lab technician effective November 15, 1981 as indicated by the employer. The Director remanded the case for necessary action for recomputing appellant's entitlement based on the change in position effective November 15, 1981.

In a letter decision dated May 8, 1986 the Office recalculated appellant's entitlement to compensation for loss of wage-earning capacity effective November 15, 1981 and found a 34 percent loss of wage-earning capacity. The Office stated the following:

> "When you changed jobs on November 15, 1981, your capacity to earn premium pay such as shift differential was unknown, and the work you did before November 15, 1981 was so different from the new job it would be unrealistic to base your earning capacity on what you made before November 15, 1981. Therefore, we used your earnings for calendar year 1982, excluding overtime, to determine your earning capacity. Your employer could only report this on a calendar year basis. We found that your base pay was $21,040.00, and shift differential was $351.07, for a total of $21,391.07 or $411.37 per week. We took the December 31, 1982 base pay rate for GS 11 step 4 (26,959) plus 25 percent of the annual pay for GS 10 step 1 (5,576.75) and divided the total by 52, giving us $625.69 per week. Thus we have the numbers to make the fraction: 411.37 divided by 625.69 equals .66, which is to say your injury has caused a 34 percent decrease in your wage-earning capacity. The rest is just simple math. Your entitlement to compensation retroactive to November 15, 1981 is as follows:

November 15, 1981 to February 28, 1982	$164.75 per week:	$2,494.79
March 1, 1982 to February 28, 1983	$179.00 per week:	$9,333.57
March 1, 1983 to February 28, 1984	$186.00 per week:	$9,725.14
March 1, 1984 to February 28, 1985	$192.25 per week:	$10,024.46
March 1, 1985 to January 18, 1986	$199.00 per week:	$9,210.86

> Total entitlement for the period November 15, 1981 to January 18, 1986: $40,788.82"

The Office therefore determined that there had been an overpayment in the amount of $2,300.54 caused by the receipt of shift differential between 1981 and 1986 for which appellant was found without fault.

Appellant subsequently submitted the February 2, 1987 statement of his supervisor at the laboratory, Mr. C. D. Holmes, which read as follows:

> "Mr. Larry Nelson was transferred to the Laboratory on November 15, 1981. He received 17 days of on-the-job training

> before taking over a shift operation on December 22, 1981. Between the above dates he was on vacation for eight days and off for one holiday. This is the entry level for Chemical Laboratory Technicians at FMC.
>
> "We train our people to do our specific methods and techniques which are peculiar to our industry. Our staff consists of 12 technicians which have transferred from other operations in the plant. They have all received our in-plant training and come into the laboratory through the same route as Mr. Nelson. This position involves routine sample preparation and physical analyses, routine instrument analyses and very limited chemical analyses."

Appellant also submitted the February 4, 1987 letter of his personnel supervisor, Mr. MacKay, which stated the following:

> "Evidently someone in your office interpreted my letter of June 25, 1985, to state 'that on-the-job experience has qualified Mr. Nelson for a higher rate of pay.' My letter stated that if certain things occurred an employee would qualify for a pay increase. An increase is based on on-the-job performance and his salary position within his salary grade range.
>
> "Each of our salaried employees is reviewed on an annual basis. An increase, if any, is based on the employee's job performance, where his current salary fits within his salary grade range and the salary increase dollars available for all employees.
>
> "If his current salary is high compared to the midpoint of his range and performance is average he receives a very small or no increase at all. It is also influenced by the economic conditions at the times and inflation. Currently economic conditions are poor and inflation is very low.
>
> "In 1981 there was a reorganization in our Safety Department and a Safety Technician was returned to the plant guard position. To avoid a lay-off Mr. Nelson accepted a lateral transfer to the Lab Technician position.
>
> "In his current position of Lab Technician, he is still in the same salary pay grade and there is no appreciable difference between his current salary and that of a guard who started in that position within three months of Mr. Nelson's starting date."

Appellant's hearing was held on February 5, 1987 and in a decision dated June 16, 1987 the Office hearing representative affirmed the May 8, 1986 decision. The hearing representative noted that appellant underwent on-the-job training as a chemical technician and therefore the Office modification of its loss of wage-earning capacity determination was valid. The hearing representative also affirmed the Office's findings as to the overpayment, however, in light of the absence of financial data the case was remanded to the Office in order to determine the rate of recovery of the overpayment. On July 8, 1987 the Office denied waiver of recovery of the overpayment.

The Board finds that the evidence does not support the Office's redetermination of appellant's wage-earning capacity.

In *Ronald Masao Yokota*, the Board stated:

> "Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost." [1]

In the present case, the evidence does not establish that the Office in redetermining appellant's loss of wage-earning capacity met its burden. In making its initial loss of wage-earning capacity determination, the Office used the actual position appellant was holding as a plant guard and found a 59 percent loss of wage-earning capacity. Subsequently, appellant received pay increases in his position as a plant guard from 1977 up until May 24, 1981 when he earned $1600 per month. On November 15, 1981 appellant changed his job to chemical technician. He received training for his new position, however, he was earning the same $1600 per month on November 15, 1981 when he started as a chemical technician. Subsequently, appellant received pay increases in May 1982 to $1830 per month and in August 1983 to $1940 per month. The Office recalculated appellant's entitlement to compensation for loss of wage-earning capacity effective November 15, 1981 and found a 34 percent loss of wage-earning capacity.

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[1] 33 ECAB 1629 (1982)

The record indicates that although appellant received on-the-job training following his transfer to his new position as chemical technician, the record does not contain sufficient information to permit a determination of whether appellant, in the words of the *Yokota* decision, "has been retrained or otherwise vocationally rehabilitated" so as to permit the use of a different position in redetermining his wage-earning capacity. To the contrary, the record establishes that as a chemical technician in 1987, appellant was "still in the same salary pay grade . . . [as] that of a guard who started in that position within three months of [appellant's] starting date." Moreover, this transfer to chemical technician was effected for the purpose of avoiding a layoff of appellant, and was a "lateral transfer." Without a showing of additional qualifications obtained by appellant through retraining it was improper to make a new loss of wage-earning capacity determination based on increased earnings.[2]

The decisions of the Office of Workers' Compensation Programs dated May 8, 1986, June 16, 1987 and July 8, 1987 are reversed.

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[2] *Willard N. Chuey*, 34 ECAB 1018 (1983).

In the Matter of JOSEPH PILEWSKY *and* DEPARTMENT OF THE ARMY, PICATINNY ARSENAL, Dover, N.J.

Docket No. 88-473; Submitted on the Record;
Issued April 29, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his request for a hearing.

On December 30, 1966 appellant, then a 41-year-old painter, filed a claim for an injury to his lower back sustained on that date by catching a falling shell. The Office accepted his claim for a lumbosacral strain and paid compensation for intermittent periods of disability until appellant's disability retirement on August 12, 1973. Effective August 12, 1973 the Office began paying appellant compensation for temporary total disability, which it continued until it reduced his compensation to that for loss of wage-earning capacity effective December 1, 1983.

By a compensation order dated August 21, 1986 the Office terminated appellant's compensation on the basis that he had no remaining compensable disability.

By an August 25, 1986 letter appellant requested a hearing before an Office hearing representative. By a November 5, 1986 letter the Office advised appellant that a hearing would be held on November 26, 1986. In a November 13, 1986 letter appellant requested postponement of the hearing, stating that he wanted a copy of his complete case record and that he was unable to prepare for a hearing on November 26, 1986. On January 7, 1987 the Office sent appellant a copy of his case record.

By a letter dated April 20, 1987 the Office informed appellant that it had rescheduled his hearing for May 21, 1987.

On May 6, 1987 appellant called the Office and stated that he was in New Jersey seeking employment and that he would be there at least two more months; appellant requested that the hearing scheduled for May 21, 1987 in Tampa, Florida be postponed. An Office hearing representative indicated that he agreed to appellant's request. In a May 6, 1987 confirmatory letter appellant requested that the hearing be rescheduled for sometime after August 31, 1987. In a September 1, 1987 letter appellant requested that the hearing be postponed.

By a letter dated October 5, 1987 the Office informed appellant that it had rescheduled his hearing for October 28, 1987.

On October 19, 1987, according to an Office memorandum, appellant called the Office and stated that he wanted to postpone the hearing scheduled for October 28, 1987 as he was in Las Vegas, Nevada. The Office memorandum stated: "I repeated [appellant's] request to him—he talked quickly and hung up because his 3 minutes were up." In the memorandum of this telephone call an Office official stated that he reviewed the file after the call and found that three hearings had been scheduled, that he did not approve appellant's request for a postponement, and that appellant could not be reached at his number in Florida to be advised of the regulatory provisions and had not provided a number in Las Vegas.

In an October 20, 1987 letter the Office advised appellant that its regulations provided that failure to appear at a third scheduled hearing constituted abandonment of the request for a hearing unless extraordinary circumstances prevented the appearance, that being out of town in Las Vegas was not considered "extraordinary circumstances," and that if he failed to appear at the hearing scheduled for October 28, 1987 a decision that he had abandoned his request for a hearing would be issued.

By a decision dated November 17, 1987 the Office found that appellant had postponed two previously scheduled hearings, that he had requested postponement of his third scheduled hearing on the basis that he was in Las Vegas, and that he had abandoned his request for a hearing as he did not appear at the hearing scheduled for October 28, 1987 and did not show "extraordinary circumstances" for his failure to appear.

The Board finds that appellant abandoned his request for a hearing. 20 C.F.R. section 10.137(c) states:

> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the clamant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, another hearing will be scheduled. Unless extraordinary circumstances such as hospitalization, a death in the family, or similar circumstances which prevent the claimant from appearing are demonstrated, failure of the claimant to appear at the third scheduled hearing shall constitute abandonment of the request for a hearing."

The Board finds that appellant's postponement of the first two scheduled hearings constituted a failure to appear at these hearings within the meaning of 20 C.F.R. section 10.137 and that, although the Office excused his failure to appear at the first two hearings for good cause, appellant did not show that extraordinary circumstances of the type set forth in the Office's regulations prevented him from appearing at the third scheduled hearing. Under these circumstances, the Office properly found that appellant had abandoned his request for a hearing.

The decision of the Office of Workers' Compensation Programs dated November 17, 1987 is affirmed.

In the Matter of IRWIN J. SCHUMACHER *and* DEPARTMENT OF THE ARMY, MATERIAL DEVELOPMENT AND READINESS COMMAND, Alexandria, Va.

Docket No. 87-1689; Submitted on the Record; Issued April 29, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a 52 percent binaural hearing loss for which he received a schedule award; (2) whether appellant's disability after July 9, 1979 was causally related to his employment-related hearing loss; and (3) whether appellant's cochlear implant was required due to his employment-related noise-induced hearing loss.

On April 18, 1977 appellant, then a 56-year-old industrial engineer, filed a claim alleging that he had sustained a severe hearing loss, causally related to his federal employment. Appellant's supervisor completed the reverse side of the claim form on April 18, 1978 and noted that appellant had not stopped work.

In support of his claim, on April 19, 1978 appellant submitted a statement in which he alleged that his hearing loss was the result of his exposure to hazardous noise while performing noise evaluations on engines during his federal employment, from June 1951 to July 1968. Appellant also alleged that his hearing loss deteriorated following a helicopter flight on May 22, 1969 during which he did not wear a protective helmet. Appellant submitted audiograms performed from 1970 until 1978, and various medical reports from 1973 until 1978. On July 17, 1973, an audiologist reported to Dr. Irvin Feldman that:

> "Hearing for pure tones in the left ear is normal through 1000 Hz with a moderate to severe sensorineural decrease involving 1500 to 8000 Hz. A positive SISI score at 4000 Hz in the left ear suggests cochlear pathology. The right ear displays a moderate reduction in hearing for speech with markedly limited auditory discrimination. Hearing for pure tones reveals a mild sensorineural hearing loss through 1000 Hz with moderate to profound involvement from 1500 to 8000 Hz. A negative SISI score at 2000 Hz is suggestive of retro-cochlear pathology. Sweep frequency Bekesy tracing for the right ear results in cochlear patterns, however.

> "Little measurable improvement by means of hearing aid amplification was apparent. Therefore, use of hearing aid amplification is not recommended at this time."

On July 23, 1973 Dr. Irvin Feldman, a Board-certified otolaryngologist, reported that he had examined appellant on June 18, 1973 due to bleeding in his right ear, that an audiogram revealed a marked loss of perception-type hearing and poor discrimination, and that appellant had been referred to the Washington Hospital Center Hearing and Speech Clinic for special tests.

On June 13, 1977 Dr. Blair Webb, a Board-certified otolaryngologist, reported that he had examined appellant on May 6, 1977, that appellant had complained of hearing loss, ringing in his ears and dizziness on arising from the sitting position. Dr. Webb noted that appellant had undergone a complete tumor workup, however, no tumor formation could be found. The doctor reported that appellant had a severe sensorineural hearing loss on the left and no measurable hearing on the right, and that he had recommended that appellant obtain lip reading instruction from the hearing society. The doctor also opined that appellant should no longer perform employment which required listening. On July 14, 1977 an audiologist reported that he had evaluated audiograms performed on September 29, 1976, April 18, 1977, and July 13, 1977 and had found that:

> "[T]est results on the right ear indicate no response to any frequency at any level except at 250 and 500 Hz at the limits of the equipment. Results on the left ear indicate a severe-to-profound, progressive, sensorineural loss with extremely poor, deteriorating speech discrimination ability."

Appellant was referred for further audiological testing by the employing establishment. On March 21, 1978 an audiologist reported as follows:

> "Mr. Schumacher was referred to this Center for a formal audiologic evaluation by the U.S. Army. . . . Referral to the records will substantiate the presence of a moderate bilateral high frequency sensorineural hearing loss (documented 1970 by the Washington Hospital Center), that has become quite progressive since that time. Following several hearing aid evaluations and the use and purchase of at least three hearing aids since 1974, this man now wears Viennatone PP900 body aid on the left ear and is pleased with its performance although he is

> aware of the fact that because of his hearing loss, any amplification is quite limited in the benefit it can provide. . . .
>
> "The audiologic evaluation today at this Center revealed a bilateral sensorineural hearing loss, profound on the right ear with only tactile responses to sound observed, and severe to profound on the left with no ability to discriminate speech demonstrated. A speech reception threshold could only be obtained only with selected spondees for the left ear. SA speech detection threshold was obtained at 60 dB. Impedance results demonstrated maximum compliance at 0 mm pressure bilaterally, and absent stapedial reflexes. These results indicate normal middle ear pressure and compliance and support the severity of the hearing loss for each ear."

* * *

> "It is recommended that he be removed as soon as possible from any employment situation which is not able to provide him with the benefit of no interfering background noise of any type no matter how loud, one in which telephone use is necessary, and one in which time and effort cannot be taken to communicate directly with him.
>
> "Mr. Schumacher has taken every step available to him to thoroughly investigate his hearing loss and the means available to improve his communicative abilities. It is recommended that he continue the aural rehabilitation classes at the University of Maryland, and it is most imperative that he be followed otologically to rule out any other interfering medical problems, particularly since his loss has progressed significantly rather quickly since 1970."

On August 22, 1978 the employing establishment submitted a statement that appellant was no longer exposed to hazardous noise in his current employment position, and submitted personnel records to substantiate that appellant had been employed at the U.S. Army Material Command Headquarters with no hazardous noise exposure, since January 23, 1972.

By compensation order dated June 8, 1979 the Office denied appellant's claim finding that appellant had not timely filed his claim for compensation. On June 18, 1979 appellant requested a hearing. A hearing was held on November 28, 1979 before an Office hearing representative.

At the time of the hearing appellant submitted a medical report from Dr. Feldman, dated June 12, 1979, who reported as follows:

> "[I]t now appears that you have lost almost all of your hearing, the last amount of hearing loss being noted in April, 1979, and documented by changes both in our office and at Gallaudet College. It seems now that your hearing loss is so severe that your ability to work especially using the telephone and attending meetings, is severely impaired. I agree that you would benefit from audiological rehabilitation from an audiologist including cued speech, lip reading and other hearing aid practices to enable you to communicate better. This letter will attest to the fact that I believe that your hearing loss is a disabling problem and it seems to be related to your exposure to the loud noises in your employment.
>
> "I agree that you should avoid further loud noises and situations in which you need to communicate. If this is a problem, then retirement appears to be the only answer at this time."

Appellant also submitted a report from Dr. Louis H. Shuman, a Board-certified urologist, dated July 3, 1979. Dr. Shuman reported that recent audiologic assessments at Gallaudet College indicated that appellant had lost "almost all of his hearing." Dr. Shuman also opined that, "[t]his letter will substantiate that he has a disability problem because of his hearing loss and based on available audiological assessments and medical records, his hearing loss could have been caused by his exposure to loud noise while performing noise tests for the Army during his employment."

Appellant additionally submitted two statements from his former supervisors, who had supervised him at the time of the alleged noise exposure. Both of his former supervisors stated that they had been aware of the appellant's hazardous noise exposure at the time of the occurrences.

Audiologic evaluations performed at the Gallaudet College on April 24, 1979 and May 3, 1979, were submitted to the record. The results of the testing performed on April 24, 1979 revealed a severe hearing loss for the low frequencies, with a profound hearing loss in the high frequency range for the left ear. Responses for the right ear, when obtained, were vibrotactile. On April 24, 1979 the audiologist reported that responses for the left ear could only be obtained from 1000 Hz through 6000 Hz. These responses were in the profound hearing loss range. Other obtainable responses were vibrotactile bilaterally.

On July 6, 1979, appellant filed a claim for compensation alleging that he had stopped work on July 9, 1979, due to his employment-related hearing loss.

On December 19, 1979 the Hearing Representative found that although appellant had not filed his original claim within five years of his hearing loss, appellant's supervisor had actual knowledge of his injury within 48 hours. The Hearing Representative therefore remanded the case to the Office for further development.

On February 20, 1980 Dr. Feldman reported to the Office that he had treated appellant since July 1964; on September 5, 1974 appellant had presented a complaint that his hearing had become worse, particularly on the left side. Dr. Feldman reported that he examined appellant and that the physical examination was negative except for "slight retraction of both [ear] drums."

On March 18, 1980 the Office medical adviser evaluated the case record and reported that appellant had been exposed to hazardous noise for 23 years of his federal employment. The doctor noted that appellant had occasionally suffered from ear infections and ear "blocking" however other medical information appeared noncontributory. The medical advisor commented that he believed the audiograms performed from November 27, 1976 through October 10, 1979, to be incomplete and unreliable.

The Office medical adviser concluded that the October 1, 1974 audiological evaluation was consistent and reliable. He stated:

> "Based on the submitted evaluations January 29, 1970 and October 1, 1974 the claimant had a bilateral hearing loss at that time, October 1, 1974. It was felt that his hearing impairment was causally related to his employment.
>
> "A rapid deterioration in sensitivity was observed of the January 29, 1970 and October 1, 1974 evaluations.
>
> "There was a 20–55 dB and 15–50 dB change in sensitivity in the right and left ears, respectively. This depression in acuity in four years is not consistent to the literature on occupational noise exposure.
>
> "Secondly, special test, Short Increment Sensitivity Index (SISI) and the PB scores were strong indications of a contributing agent. The SISI test aids in the diagnosing of the etiology; it evaluates the individual's ability to detect small changes in intensity. When the pathology is located in the cochlear, the individual obtains a high SISI score. However, the cases of extremely low scores (as in this case at 1 KH on the October 1, 1974) another pathology is suspected. . . . Yet if there was a

> very low or absent PB score (as in this case) then another pathology may be involved.
>
> "Therefore, based on the rapid deterioration in acuity, the low SISI score, and his speech discrimination score, any change in sensitivity observed after October 1, 1974 was not causally related to his employment."

The medical adviser concluded that appellant's date of maximum improvement was October 1, 1974, that appellant had a 72.5 percent monaural loss of hearing in the right ear, and a 47.5 percent monaural loss of hearing in the left ear, for a 52 percent binaural loss.

By compensation order dated April 30, 1980 appellant was awarded a schedule award for 52 percent binaural hearing loss. The period of the award was from October 1, 1974 until September 27, 1976.

On May 29, 1980 appellant requested reconsideration of his schedule award. On August 26, 1980 appellant submitted a report from an audiologist, dated January 24, 1980 which reported that hearing loss can be significantly worsened by use of a hearing aid if the hearing aid is set at a high level to maintain employment. The audiologist added that "this worsening of hearing is caused by further destruction of cochlear hair cells."

On November 28, 1980 Dr. Feldman reported as follows:

> "Mr. Schumacher has been a patient of mine for many years because of hearing loss. He states that he had a sudden change in hearing for the worse on May 2, 1979 while at work. In order to communicate the patient wore a hearing aid at a high gain level and it is certainly possible to damage the cochlear by using an aid over a period of time at a high gain level."

On January 14, 1981 Dr. James Snow, Jr., a Board-certified otolaryngologist, reported as follows:

> "Mr. Irwin J. Schumacher, was first referred to me as a patient on June 26, 1980 as a potential candidate for a cochlear implant because of his profound hearing loss (sensorineural deafness). His present condition is such that his hearing aid is of little benefit to him in trying to communicate. Cochlear implant candidates have a threshold loss of 95 dB or greater. Mr. Schumacher states that his present condition is the result of a sudden worsening of his hearing which occurred at work on May 2, 1979 while wearing his hearing aid at high gain in

> order to communicate. A sensorineural loss of hearing can be worsened by the use of a hearing aid at high gain and it is reasonable to assume that this occurred in Mr. Schumacher's case."

On April 15, 1981 the appellant informed the Office that he had a cochlear implant operation performed on December 19, 1980, appellant also requested reimbursement for his medical expenses relating to this surgical procedure.

On April 20, 1981 appellant submitted a report from an audiologist which reported, in part:

> "In Mr. Schumacher's case there does seem to be reasonable evidence that the essentially total loss of hearing that he experienced was related to the continued use of a hearing aid and the latent damage produced by noise exposure. There is neurophysiologic evidence that indicates his loss of hearing was localized to damage inflicted on the cochlea.
>
> "These findings were obtained through electrocochleagraphy and through the cochlear implant procedure. There is no other health related evidence that I am aware of that would suggest a cochlear etiology other than that which would be caused by excessive noise exposure."

By letter compensation order, on May 13, 1983 the Office informed appellant that the medical evidence of record established that his loss of hearing after the date of his last exposure to hazardous work-related noise was due to his underlying audiological condition and therefore was not compensable.

On May 25, 1983 appellant requested reconsideration. By letter dated May 23, 1984 the Office advised appellant that the audiologist's opinion that the further deterioration of appellant's hearing was due to his hearing aid, was speculative and of little probative value. The Office also advised appellant that he must submit a medical report, with rationale to substantiate that his surgery was causally related to his accepted noise-induced hearing loss. The Office also advised appellant that his hearing loss after October 1, 1974 was not attributable to hazardous noise and that the October 1, 1974 audiogram was the most reliable report of his hearing loss.

On July 9, 1984 an audiologist reported that although it was uncommon for an individual to suffer a progression of hearing loss to the degree appellant did, it was possible in an office setting if the individual used a hearing aid. The audiologist also submitted the results from a cochlear implant research project in which appellant participated. The results revealed that prior to the implant, appellant was unable to understand speech without lipreading, and subsequent to the implant, he was still unable to understand speech without lipreading, to any appreciable degree.

On July 13, 1984 Dr. Feldman reported that appellant's hearing had deteriorated while wearing a hearing aid. Dr. Feldman concluded: "[t]his may well represent trauma from the hearing aid being so loud in his ear when he has had to turn it up in order to hear above surrounding noises."

On July 13, 1984 Dr. Snow reported that he had recommended that appellant undergo lipreading and aural rehabilitation in preparation for, and as rehabilitation following, his cochlear implant. Dr. Snow concluded that "these services were recommended to allow you to obtain maximum benefit from the cochlear implant that was done for the treatment of profound deafness."

On July 20, 1984 appellant submitted hospital records and literature, pertaining to his cochlear implant of December 19, 1980.

By compensation order dated March 7, 1985 the Office denied modification of its prior order, finding that the evidence submitted did not establish that appellant had more than a 52 percent binaural hearing loss, causally related to his accepted noise exposure.[1]

On May 12, 1985 an Office medical adviser reviewed the case record for the Office and stated as follows:

> "Claimant presently has a 52 percent binaural sensorineural hearing loss as calculated from an October 1, 1974 audiogram, but currently claims he is totally disabled due to deafness progressive since that time until 1979. The question to be resolved is whether the hearing deterioration subsequent to 1974 is causally related to job-related noise exposure, and whether the claimant is entitled to additional compensation and reimbursement of expenses incurred to ameliorate his hearing loss.
>
> "Examination of audiometric test results of January 20, 1970, compared to test results obtained October 1, 1974, reveals a marked deterioration in thresholds on the more recent audiogram. The predominant decline appears to be in the right ear where the hearing limitation became so severe by 1974 that no measurable hearing for speech was obtained. Additionally, there was audiologic indication at that time that possibly the

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[1] The Office noted in its accompanying letter to the appellant that no final decision had been made concerning his claim for disability compensation, nor for his claim for reimbursement of medical expense following the cochlear implant.

> hearing loss had origin outside (beyond) the cochlea. This did not prove to be the case based on neurological examination. Nonetheless, the rapid increase in hearing loss from 1970 to 1974 to the point where no usable hearing for speech remained in the right ear is atypical of noise-induced hearing loss, except for that which results from sudden, or blast, injury.
>
> "It is my opinion that this claimant has a bilateral progressive sensorineural hearing loss which would have worsened regardless of job environment. The use of hearing aid amplification as a potential causative factor contributing to the augmentation of hearing loss amount in impaired ears is not well-documented in the literature and it is reasonably doubtful that the use of a hearing aid from 1974 to 1979 resulted in the need for cochlear implant surgery. Cochlear implant surgery was, in 1980, an experimental procedure, an elective operation for adults who had an acquired deafness and could not be helped by conventional hearing aid use.
>
> "There is little doubt that the claimant is totally disabled because of deafness for any employment which requires normal auditory capability. He is simply unable to function auditorally without the use of visual and environment clues—even with the cochlear implant hearing aid. There is nothing in claimant's file to support that the decrease in hearing incurred following 1974 was in fact caused by job-related noise exposure. Following 1974 claimant had a severe to profound hearing loss and it is doubtful to further injure an already injured ear.
>
> "It is further my opinion, albeit belated, that the hearing loss of record in 1974 which resulted in a disability value of 52 percent is not clearly noise-related based on the 1970 and 1974 audiograms. Even if the claimant was "noise susceptible," and even if the noise level were found to be of hazardous intensity, and on the assumption he was provided (and used) hearing protectors, the rapid decline in hearing from 1970 to 1974 strongly suggests that some other pathology is the primary causative factor."

On June 4, 1985 appellant requested reconsideration and submitted two medical reports from Dr. Feldman.

On April 26, 1985 Dr. Feldman reported that he had discussed appellant's condition with Dr. McFarland, and that they both had agreed that appellant's hearing may have been made worse by the high gain hearing aid that he had to use. Dr. Feldman also submitted two scientific papers discussing the effects of hearing aids on hearing, which the doctor commented "give good evidence that it is possible to have further hearing loss." On May 28, 1985 Dr. Feldman reported as follows:

> "It is stated in the March 7, 1985 memorandum that the medical advisor opined that the audiogram of October 1, 1974 best represented the extent of the claimant's hearing loss, 'explaining that other audiograms were deficient and that the tests were either incomplete or unreliable.'
>
> "The accepted facts agree that the patient was exposed to noise on November 5, 1974, after the October 1st cut-off date established by the examiner. I am not sure why he considers all the audiograms since that time as being invalid, but the audiograms in September 1976, and April and July 1977 were performed at the University of Maryland Speech and Hearing Clinic, which is a well-qualified audiometric facility. The March 1978 audiogram was performed at Walter Reed, and the final audiograms in 1979, at which time Mr. Schumacher noticed the last significant hearing loss, were performed at Gallaudet College, a world-recognized and Federally chartered institution with a superb audiometric facility. He was seen in our office by qualified physicians several times in 1973, 1974, 1975, 1976, 1977 and 1979, at the time that he suffered his last hearing loss when he was seen on an emergency basis on May 3, 1979 when his hearing suddenly went off while at work and wearing his hearing aid at high gain. Audiometric evaluations were then performed at Gallaudet College, and the patient had such a severe hearing loss that he decided to undergo a cochlear implant at Los Angeles at the House Institute of Otology. This procedure was originated at this facility and at that time may only have been available at that facility as a research project certified by the Federal government. The only people who were considered for that kind of surgery were patients who were considered postlingually deaf, thus adding to the documentation that Mr. Schumacher was considered deaf at that time.
>
> "Mr. Schumacher cites that his hearing deteriorated while at work and while wearing his hearing aids at high gain in order to hear. I have submitted papers from the literature documenting this type of hearing problem. I have reviewed the audiometric evaluations and the comments by Dr. William McFarland and his coworkers just as if these were done in my

> office. I feel that they are extremely well-done audiometric evaluations and are certainly valid and complete.
>
> "I do not know what other information that you need, but the date of October 1st (1974) certainly seems to be arbitrarily picked."

On January 13, 1986 the Office submitted the case record, along with a statement of accepted facts to Dr. I. Sidney Jaffee, a Board-certified otolaryngologist and Office medical consultant, for evaluation. The Office requested that Dr. Jaffee comment on whether appellant's use of a hearing aid after October 1, 1974 increased his hearing loss, the extent of the additional hearing loss, and whether appellant's hearing loss rendered him totally disabled for the job he held at the time of the injury.

On July 29, 1986 Dr. Jaffee reported as follows:

> "Response to Question Number 1. Did hearing aid use after October 1, 1974 cause an increase in his loss of hearing? On that date review of an audiogram performed at the Washington Hospital Center, revealed a 40dB average hearing loss on pure tones with a severe high-tone loss with a 30 dB SRT and a discrimination score of 52 percent in the left ear. In the right ear on that date he had a 55 dB loss of pure tones in the speech range with a severe high-tone loss present.
>
> "Both ear losses were sensorineural in type and SRT's could not be established at that time. Review of an audiogram performed at the Washington Hospital Center on January 29, 1970 revealed a hearing level of [illegible]5 dB in the left ear with a moderate high-tone sensorineural loss and a 15 SRT with 92 percent discrimination. In the right ear there was a 25 dB loss with a moderate-to-severe high-tone loss, sensorineural in type.
>
> "Speech reception thresholds revealed a 24 dB level with 94 percent discrimination. The tremendous increase in the hearing loss which occurred in less than five years between these two tests would appear to indicate a hearing loss due to factors other than noise exposure alone. From the record, Mr. Schumacher began using a hearing aid to help with his rapidly progressive hearing loss, starting in October 1974.
>
> "There is a letter included in the file from Dr. Blair Webb wherein he reported on an examination performed on May 6, 1977. As early as that date the test results were described as showing a severe sensorineural hearing loss in the left ear with no measurable hearing in the right ear. The actual audio-

metric data are not included. At that time, Dr. Webb recommended that lip reading instruction be obtained and that employment should only be that in which listening was not required.

"A series of tests were performed at the University of Maryland which revealed rapid deterioration of hearing in the left ear as noted on a test in 1976 resulting in a pure tone average of 63 dB, one in April 1977 with a pure tone average of 70 dB, and another in July 1977, three months later, with a pure tone average of 75 dB. A pure tone average in a report listed by Mr. Schumacher on March 1978, from Walter Reed Army Medical Center, revealed a pure tone average of 75 dB: on April 24, 1979 a pure tone average of 92 dB; on May 3, 1979 an average of 103 dB. Mr. Schumacher states that he was exposed to noise on a helicopter flight and a hearing test done one month later on June 12, revealed a loss of 97 dB. A test in October 1979 revealed a loss of 100 dB.

"In my clinical practice which includes many hearing loss patients I am not aware of any patient who has documented evidence of hearing loss due to hearing aid usage therefore, I do not believe this is the case in this instance.

"Response to question Number 2 is not appropriate on my part because I do not believe that the hearing aid usage added to the progression of hearing loss suffered by Mr. Schumacher.

"Response to Question Number 3 is that cochlear implants are indicated in postlingually deafened patients who have severe enough hearing loss to not have any appreciable speech compensation. I am a former member of the Panel of the Food and Drug Administration where cochlear implants have been thoroughly discussed. For the most part the cochlear implant is considered successful if the individual gains some improvement in sound awareness and on rare occasion may even develop slight improvement of speech comprehension.

"Response to Question Number 4. I believe that the claimant's hearing loss as reported in April 1979 (a 92 dB loss in the left ear and no obtainable hearing in the right ear) left him totally disabled for any positions where hearing would be the only type of work in which Mr. Schumacher would be capable."

On September 23, 1986 the Office asked Dr. Jaffee whether a 52 percent binaural hearing loss would render appellant totally disabled for all employment.

On October 24, 1986 Dr. Jaffee responded as follows:

> "I have reviewed your letter dated September 23, 1986 regarding Mr. Schumacher. The question you raised was pertaining to disability from employment because of 52 percent binaural hearing loss. A loss of this amount does not render an employee disabled from employment. The work restrictions should carefully be that of elimination of noise exposure at the work place so as to not cause further deterioration of the hearing due to exposure to noise."

By compensation order dated April 27, 1987 the Office found that the weight of the medical evidence established that claimant's loss of wage-earning capacity due to hearing loss and appellant's cochlear implant were not causally related to his accepted 52 percent binaural loss of hearing. In a separate compensation order, dated April 27, 1987, the Office denied modification of its April 30, 1980 decision, which granted appellant a schedule award for a 52 percent binaural hearing loss.

The Board finds that this case is not in posture for decision due to a conflict in medical opinion.

On April 30, 1980 appellant was awarded a schedule award for a 52 percent binaural hearing loss based upon an October 1, 1974 audiogram. Appellant was no longer exposed to hazardous noise following October 1, 1974; however, he has alleged that his hearing continued to deteriorate due to his use of hearing aids, necessitated by his employment-related hearing loss. Appellant submitted reports from Dr. Webb dated June 13, 1977, Dr. Feldman dated June 12, 1979, and a report from Dr. Shuman dated July 3, 1979 which do substantiate that by 1979 appellant's hearing loss had progressed to a profound loss for the left ear, and no measurable hearing remaining in the right ear. By 1979, both Dr. Webb and Dr. Feldman opined that appellant could no longer perform employment which required listening. The subsequent reports submitted by Dr. Feldman and Dr. Snow related appellant's deterioration in hearing loss to his federal employment and to the use of a hearing aid necessitated to correct his employment related loss. On March 18, 1980 the Office medical adviser opined that based on the rapid deterioration in acuity, the low SISI score and the speech discrimination score, appellant's hearing loss after October 1, 1974 could not be causally related to his employment.[2]

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[2] On January 24, 1980 an audiologist opined that appellant's hearing loss could become worse due to his use of a hearing aid. The audiologist added that the worsening of hearing is caused by further destruction of cochlear

Continued

On November 28, 1980 Dr. Feldman, an otolaryngologist and appellant's treating physician, reported that it was certainly possible to damage the cochlea by using a hearing aid over a period of time. On January 14, 1981 Dr. Snow, also appellant's treating otolaryngologist reported that "a sensorineural loss of hearing can be worsened by the use of a hearing aid at high gain and it is reasonable to assume that this occurred in Mr. Schumacher's case." On July 13, 1984 Dr. Feldman reported that appellant's hearing had deteriorated while appellant had worn a hearing aid. Dr. Feldman again opined that "this may well represent trauma from the hearing aid being so loud in his ear when he has had to turn it up in order to hear above surrounding noises." On April 26, 1985 and again on May 28, 1985 Dr. Feldman reported that scientific literature supported his opinion that appellant's hearing loss could have been made worse by the use of the high gain hearing aid.

The Office then referred the case record to Dr. Jaffee, an Office medical consultant, who reported on July 29, 1986 that "[i]n my clinical practice which includes many hearing loss patients, I am not aware of any patient who has documented evidence of hearing loss due to hearing aid usage. Therefore, I do not believe this is the case is this instance."

A conflict in medical opinion, however, may not be resolved by a physician who acts as a medical consultant for the Office.[3] The Board finds that the reports of Dr. Feldman and Dr. Snow, appellant's otolaryngologists, are in conflict with the opinion of the Office medical adviser which necessitates referral of appellant to a Board-certified specialist for an impartial medical examination.

The Office should prepare a statement of accepted facts, and refer it together with appellant, and the case record to an impartial otolaryngologist for a complete audiological examination and otolaryngological evaluation. The impartial specialist is to provide an opinion as to the degree of appellant's binaural hearing loss, and a rationalized medical opinion on the issue of whether appellant's hearing loss subsequent to October 1, 1974 and his subsequent disability is causally related to his federal employment. The impartial specialist shall also be requested to provide a rationalized medical opinion whether the cochlear implant procedure was required due to appellant's employment induced hearing loss. After this and any such further development as the Office deems necessary, a *de novo* decision shall be issued on the schedule award. The

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hair cells. An audiologist is not a physician within the meaning of the Federal Employees' Compensation Act, and his opinion has no probative value. *See* 5 U.S.C. section 8101(2).

[3] 5 U.S.C. section 8123(a). *See John E. Wallace*, Docket No 84-1097 (issued June 25, 1984).

Office should also determine whether as a result of appellant's use of a hearing aid, a consequential injury occurred resulting in a loss of wage-earning capacity or further hearing impairment.

The decisions of the Office of Workers' Compensation Programs dated April 27, 1987 are hereby set aside and this case is remanded to the Office for further development consistent with this opinion.

In the Matter of ARTHUR P. WEST *and* NATIONAL LABOR RELATIONS BOARD, Newark, N.J.

Docket No. 88-359; Submitted on the Record;
Issued May 4, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of $65,252.82 during the period June 18, 1981 to August 2, 1986; (2) and if so, whether the Office properly determined that appellant was not without fault with respect to the overpayment and that, therefore, the overpayment was not subject to waiver; and (3) whether the Office properly required immediate repayment of the overpayment in the lump sum of $65,252.82.

On January 16, 1970, appellant, then a 54-year-old compliance officer, filed a notice of occupational disease and claim for compensation alleging that he sustained anxiety neurosis due to stressful factors of his federal employment. The Office of Workers' Compensation Programs accepted appellant's claim for "aggravation of preexisting psychiatric condition" and authorized payment of medical expenses related to treatment of such condition. The record indicates that appellant retired on April 13, 1971 and commenced receiving benefits under the U. S. Civil Service Retirement Act.

By letter dated July 21, 1979, appellant inquired whether he was entitled to compensation benefits under the Federal Employees' Compensation Act and was informed by the Office, through letter dated May 1, 1972, that he was entitled to such benefits as of April 14, 1971 and, if he elected such benefits over a civil service annuity, compensation would be payable as follows: appellant would receive a lump sum payment in the amount of $10,086.57 for the period April 14, 1971, the date of his retirement, to May 1, 1972, the date of the letter, and that every four weeks thereafter, appellant would receive a check in the net amount of $727.68.[1] The Office subsequently advised appellant that his compensation under the Act was based on his loss of wage-earning capacity. On April 21, 1972, the Office determined that appellant had sustained a 62 percent loss of wage-earning capacity by comparing $420.42, his weekly rate of pay as a compliance officer as of the date his disability commenced, to $158.36, his actual weekly earnings as a community service worker with the Newark Housing Authority.[2] By letter received in the Office on May 8, 1972, appellant elected benefits under the Act which he received retroactive to April 14, 1971 and on August 24, 1972, appellant was placed on the automatic compensation rolls.[3]

The record indicates that due to periodic consumer price index increases and changes in appellant's health benefit program, appellant's monthly net compensation payment increased as follows: $765.92 effective June 28, 1973; $807.92 effective February 19, 1974; $852.84 effective July 25, 1974; $858.30 effective January 9, 1975; $912.46 effective March 6, 1975; $950.46 effective August 21, 1975; $982.34 effective March 4, 1976; $1,032.10 effective March 3, 1977; $1,084.10 effective October 13, 1977; $1,147.50 effective July 20, 1978; $1,198.80 effective February 1, 1979; $1,204.50 effective March 1, 1979; $1,268.14 effective August 16, 1979; $1,324.54 effective January 31, 1980; $1,473.66 effective March 1, 1981; and $2,394.66 effective June 18, 1981.

By letter dated July 31, 1986, the Office notified appellant that a review of his case file indicated that on June 18, 1981, due to computer error, appellant commenced receiving compensation payments based on a total disability rate rather than his correct rate based on loss of wage-earning capacity and advised appellant that his future compensation payments would be adjusted to reflect compensation correctly computed on loss of wage-earning capacity.

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[1] The record indicates that this amount was subsequently reduced to $726.12 due to appellant's choice of health benefit plans.

[2] The record indicates that by letter dated September 1, 1971, appellant informed the Office that he had accepted employment with the Newark Housing Authority effective April 14, 1971 and earned approximately $158.36 per week. On January 6, 1972, an Office rehabilitation adviser reviewed appellant's file and determined that appellant's weekly wage of $158.36 represented his actual wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing that such earnings do not reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure. *Clyde Price*, 32 ECAB 1932 (1981).

[3] The record indicates that appellant kept the Office apprised of his earnings from employment. On April 22, 1980, appellant informed the Office that he had accepted a part-time position as a census piece rate enumerator with the Department of Commerce Bureau of Census. On May 8, 1980, appellant stopped work with the Bureau of Census and on June 9, 1980, filed an occupational disease claim alleging that he contracted pneumonia as a result of his federal employment. By letter dated January 27, 1981, the Office informed appellant that the medical evidence did not support that his condition was employment related and that if he wished to pursue his claim additional medical evidence must be submitted. The Office advised appellant that this was not a final decision on his claim. The record indicates that appellant did not submit additional medical evidence and no final decision has been rendered on this claim and accordingly, is not subject to review by the Board. (See 20 C.F.R. section 501.2(c)) The record further indicates that appellant ceased employment with the Bureau of Census on May 12, 1980 and subsequently resumed part-time employment with private enterprises.

By letter dated March 24, 1987, the Office notified appellant that a preliminary determination had been made that he had received an overpayment of compensation in the amount of $60,012.18 during the period June 18, 1981 to August 2, 1986 because, due to computer error, he was paid compensation based on a total disability rate rather than his wage-earning capacity rate and a preliminary finding had been made that he was at fault in the matter of the overpayment because he should have been reasonably aware that he was not entitled to total disability benefits because he had been fully apprised by the Office that his compensation was based on loss of wage-earning capacity and he was employed while receiving full total benefits. The Office informed appellant that this was not a final decision on the overpayment matter and that he may request a prerecoupment hearing and he also had the right to submit any evidence to refute the amount of the overpayment, to refute that the overpayment occurred, or to refute the preliminary finding that he was at fault. The Office also advised appellant that it was beneficial for him to submit information concerning his income and expenses because, in the event it was determined that recovery of an overpayment was proper, the Office required information on appellant's ability to repay the debt. In this regard, the Office included with its March 24, 1987 letter an overpayment recovery questionnaire (Form OWCP-20).

By undated letter received in the Office on April 20, 1987, appellant requested a hearing before an Office hearing representative on the overpayment and a hearing was held on August 5, 1987.

At the hearing, appellant stated that he would stipulate neither to the amount of the overpayment nor that an overpayment had occurred. Appellant acknowledged that he was aware that his compensation payments had significantly increased on or about June 1981 but that he believed such increase represented that the Office had accepted his June 9, 1980 claim and had combined compensation payments due him based on his June 9, 1980 claim with those being paid under his January 16, 1970 claim. The Office hearing representative asked appellant whether he made any inquiries to the Office to confirm that his claim had been accepted or to inquire, generally as to the reason for the significant increase. Appellant responded that he did not make any inquiries because his compensation payments had increased periodically and no explanation had ever been given for such increases. The Office hearing representative asked appellant if any of the prior increases in compensation had ever equalled more than $900.00 and appellant replied that they had not. Appellant stated, however, that he was not suspect of the increase because his ability to work had substantially deteriorated subsequent to 1980 and, therefore, assumed the increase in compensation was correlative to his increased disability. The Office hearing representative asked appellant if he was aware that his compensation was based on partial disability and appellant replied that he was aware. The Office hearing representative asked appellant whether, in view of his belief that his condition had deteriorated, if he had requested the Office to increase his benefits from partial to total disability. Appellant replied that he had not made such request and again reiterated that he believed the increased compensation benefits represented compensation being paid as a result of acceptance by the Office of his June 9, 1980 claim. Appellant concluded that there was never any doubt in his mind that the Office knew exactly what it was doing when it increased his compensation payments in 1981 and he saw no reason to question such increase and that he should not be held responsible for the Office's clerical error.

The Office hearing representative then questioned appellant as to what, if anything, he did with the excess compensation money. Appellant testified that he invested the money to build up his estate and relayed to the Office hearing representative the various investments he had made and also related his various sources of income and list of usual expenses. Subsequent to the hearing, appellant submitted completed form OWCP-20, with accompanying attachments, and, on such form, reported that he had total monthly income of $3,650.00 and total monthly expenses of $2,420.00 which included $875.00 in miscellaneous household expenses. Appellant also reported on such form that as of June 26, 1987 he had cash on hand in the amount of $12,671.00, that he held certificates of deposit in the amount of $21,199.00, stocks and bonds then valued at $70,368.00, and gold, then valued at $66,326.00, for total assets in the amount of $171.245.00. Appellant testified that these assets were his assets and that they were not jointly owned with his wife. He testified that his wife has her separate holdings and that their joint holdings consist of a small savings account and a $5,000.00 investment in a realty income fund. Appellant also reported and provided documentation on certain annual charitable contributions. Appellant claimed that repayment of the overpayment would create a financial hardship. Appellant argued that given his age of 72 years, a lump sum repayment would leave him unprepared for any catastrophic health situation that may arise.

In a decision dated and finalized October 14, 1987, the Office hearing representative found that an overpayment in the amount of $65,252.82 occurred during the period June 18, 1981 to August 2, 1986, thereby modifying the Office's preliminary determination of an overpayment in the amount of $60,012.18, and further found that appellant was at fault in the matter of the overpayment and that, therefore, the overpayment cannot be waived. The Office hearing representative further found that appellant had assets in excess of $170,000.00 and that therefore the overpayment of $65,252.82 can be collected in a one-time payment without defeating the purpose of the Act, contravening equity and good conscience or creating a financial hardship for appellant.

In modifying the amount of the overpayment, the Office hearing representative noted that during the period June 18, 1981 through August 21, 1986, appellant actually received compensation in the gross amount of $184,702.11 but that he should have received during this period compensation in the gross amount of $119,449.29 which amount is based upon his 62 percent loss of wage-earning capacity determined by the Office in 1972 and which amount includes all consumer price index increases effective February 16, 1971 and thereafter. The Office hearing representative calculated that the difference between $184,702.11, gross compensation actually paid to appellant, and $119,449.29, gross compensation which should have been paid to appellant, was $65,252.82 and not the $60,012.18 determined by the Office. The Office hearing representative found that the Office erroneously credited appellant with health benefit premiums of $5,566.98 and that there was no basis for such credit because appellant was required to pay these premiums in the same amount regardless of whether compensation paid was based on total or partial disability. The Office hearing representative further found that the Office erred by using the wrong consumer price index entitlement date when it restored appellant's compensation to his loss of wage-earning capacity rate on August 3, 1986, noting that commencing that date appellant received monthly compensation in the gross amount of $1,833.00 and should have received compensation in the gross amount of $1,901.00. The Office hearing representative instructed the Office to adjust appellant's compensation effective August 3, 1986 to reflect the correct rate and to issue a retroactive payment for the deficiency incurred to date.

In finding appellant at fault in the matter of the overpayment, the Office hearing representative found that the increase in appellant's monthly income was so great, that appellant should have known the payments were incorrect. The Office hearing representative did not find persuasive appellant's contention that he believed the increased compensation represented acceptance by the Office of his 1980 occupational disease claim noting that nothing in the record provided any basis for support of this assumption.

With respect to collection of the overpayment, the Office hearing representative found that appellant profited from the overpayment and had assets in excess of $170,000.00 and that repayment of the overpayment in one lump sum would leave appellant with assets in excess of $100,000.00 and would therefore, not create a financial hardship for appellant. The Office hearing representative affirmed the preliminary determination dated March 24, 1987, as modified with respect to the amount of the overpayment, and returned the case to the Office for collection of the overpayment.

The Board finds that the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of $65,252.82 during the period June 18, 1981 to August 2, 1986.

In accepting appellant's January 16, 1970 claim and authorizing payment of compensation, the Office of Workers' Compensation Programs determined that appellant was entitled to compensation based on a 62 percent loss of wage-earning capacity and appellant commenced receiving compensation computed on this basis effective April 14, 1971. On June 18, 1981, due to computer error, the Office inadvertently commenced paying appellant compensation based on a total disability rate rather than on the correct rate of loss of wage-earning capacity. The record indicates that on June 18, 1981, appellant's monthly net compensation check increased from $1,473.66 to $2,394.66 but should have increased from $1,473.66 to $1,528.66. The Office continued to pay appellant at this higher incorrect rate until August 2, 1986, at which time the error was noted and corrected. During the period June 18, 1981 to August 2, 1986, appellant was paid compensation in the gross amount of $184.702.11 and should have been paid compensation in the gross amount of $119,449.95 thereby receiving an overpayment of compensation in the amount of $65,252.80.

The Board finds that appellant was not "without fault" with respect to the $65,252.80 overpayment and, therefore, recovery of the overpayment is not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act [4] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."[5] No waiver of overpayment is possible if the claimant is not without fault in helping to create the overpayment.

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[4] 5 U.S.C. section 8101 *et seq.*

In determining whether an individual is not without fault or, alternatively, "with fault," section 10.320(b) of Title 20 of the Code of Federal Regulations states in relevant part:

> "An individual is with fault in the creation of an overpayment who:
>
> > '(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
> >
> > '(2) Failed to furnish information which the individual knew or should have known to be material; or
> >
> > '(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.' "[6]

In the instant case, the Office, in finding appellant at fault in creating the overpayment, applied the third standard—acceptance of a payment which the individual knew or should have been expected to know was incorrect.

The record establishes that by letters dated May 1, 1972, May 4, 1972 and May 30, 1972 appellant was apprised that he was entitled to compensation benefits based on loss of wage-earning capacity. By undated letter received by the Office on May 8, 1972, appellant acknowledged that his compensation benefits were based on loss of wage-earning capacity and appellant does not, and has not, alleged that he ever believed his compensation was based on any rate other than a reduced rate of loss of wage-earning capacity or partial disability. The record further establishes that, due to computer error, the Office inadvertently commenced paying appellant compensation based on total disability rather than the correct rate computed on loss of wage-earning capacity. At that time appellant's monthly compensation checks increased from the gross amount of $1,519.00 to the gross amount of $2,440.00 or, alternatively, increased from the net amount of $1,473.66 to the net amount of $2,394.66, an increase using either set of figures, of over $900.00 per month. Under the correct rate of loss of wage-earning capacity, appellant's monthly compensation check should have increased from the gross amount of $1,519.00 to the gross amount of $1,574.00, and from the net amount of $1,473.66 to the net amount of $1,528.66, an increase of $55.00 which is commensurate with all previous increases in compensation received by appellant. Therefore in accepting compensation payments, representing an increase of over $900.00, significantly higher than that which appellant previously received, appellant knew or should have known that such payments were incorrect.[7]

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[5] 5 U.S.C. section 8129(b).

[6] 20 C.F.R. section 10.320(b).

Appellant acknowledged at the hearing before the Office hearing representative and on appeal that he was aware of the significant increase in his compensation payments but believed that such increase represented acceptance by the Office of his June 9, 1980 claim. The evidence of record, however, provides no basis of support for appellant's assumption that this claim was accepted by the Office. The record pertaining to appellant's June 9, 1980 claim clearly establishes that appellant's claim was not accepted. By letter dated January 27, 1981 the Office advised appellant that the medical evidence of record did not support an employment related condition. Although appellant was advised that the January 27, 1981 letter was not a final decision, he was also advised that his claim would not be further processed unless additional medical evidence was submitted and the record indicates that appellant did not submit such evidence. Accordingly, the record does not support appellant's assertion that his increase in compensation payments provided him with reason to believe his June 1980 claim had been accepted by the Office notwithstanding the fact that he received no written notification of acceptance. The viability of this argument is further undermined by appellant's prior experience with the Office in the filing and processing of his January 16, 1970 claim. Through this experience, appellant is aware that the Office issues written notification of acceptance of a claim and of the basis and manner in which compensation for disability is computed and paid. Additionally, the record does not indicate that appellant, if in fact he believed his June 9, 1980 claim had been accepted by the Office, requested reimbursement of medical expenses related to such claim.

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[7] *See Luis D. Alamo*, 35 ECAB 1045 (1984).

Appellant further alleges that he was not suspect of the unexplained increase in compensation in June 18, 1981 because over the course of his period of disability he had periodically received unexplained increases in compensation. The record establishes that appellant received periodic increases in his monthly compensation payments due to consumer price index increases and changes in appellant's health benefit plan but the record establishes that none of the increases prior to the June 18, 1981 increase exceeded $100.00. The increase in appellant's monthly compensation check, as of June 18, 1981, was so great, in excess of $900.00, that appellant should have known that such payment and the payments thereafter were incorrect.[8]

The Board finds that the facts of this case establish that appellant knew or should have known that his compensation checks commencing June 18, 1981 were incorrectly computed and, therefore, he was not without fault with respect to the overpayment of compensation and therefore the overpayment must be recovered.

The Board also finds that the Office properly found that appellant had sufficient financial resources such that it could require immediate recovery of the overpayment of compensation in a lump sum of $65,252.82.

At the hearing before the Office hearing representative, appellant testified that he had invested the excess compensation payments in, *inter alia*, stocks, bonds, and gold in order "to build up his estate" and submitted documentation which established that he had accumulated total assets in the amount of $171,245.00. The Board finds that the Office hearing representative gave careful consideration to appellant's financial situation, including his financial resources, his monthly income and expenses, his annual charitable contributions and his concerns regarding maintaining sufficient financial resources to meet any future unforeseen crisis, particularly, medical emergencies, and properly determined that appellant's financial situation was such that he could make immediate repayment of the overpayment of compensation in the amount of $65,252.82 without financial hardship.

The decision of the Office of Workers' Compensation Programs dated October 14, 1987 is hereby affirmed.

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[8] *Id.*

In the Matter of CARLOS E. MARTINEZ *and* DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, Utah

Docket No. 87-897; Submitted on the Record;
Issued May 5, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issues are: (1) whether appellant is entitled to increased compensation benefits pursuant to 5 U.S.C. section 8113(a) because he was either a minor or employed in a learner's capacity at the time of injury and was not mentally handicapped prior thereto; and (2) whether appellant is entitled to a schedule award for a brain disorder.

This is the second appeal in this case. In the first appeal,[1] the Board, by decision dated May 17, 1982, affirmed a November 4, 1981 decision of an Office of Workers' Compensation Programs' hearing representative, finalized November 6, 1981, finding that the medical evidence of record failed to establish that appellant had any physical condition causally related to his exposure to chemicals while in the performance of his duties.[2] The Board set aside the Office's decision and remanded the case for further development finding that the case was not in posture for decision with respect to the issue of whether appellant had an employment-related emotional condition resulting from his exposure to chemicals at work. The Board noted that the record contained support for this aspect of the claim as represented by the reports of Dr. Victor B. Cline, a clinical psychologist, to whom appellant was referred by an Office referral physician, Dr. Robert J. Farney, a Board-certified internist with a subspecialty in pulmonary disease, and appellant's attending physicians Dr. Gary M. Stephenson, a psychiatrist, and Dr. Elizabeth B. Stewart, a clinical psychologist. On remand the Board instructed the Office to refer appellant, together with a statement of accepted facts and the case record to a Board-certified psychiatrist for an evaluation and rationalized medical opinion on the issue. The facts and circumstances surrounding the first appeal are more fully set forth in the prior decision of the Board and are hereby incorporated by reference.

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[1] Docket No. 82-627 (issued May 17, 1982).

[2] Appellant was a 33-year-old electromechanical instrument and controls repairer, WG (wage grade) 9 step 4, ($5.70/hour) on August 21, 1974 when he filed a form CA-2, notice of occupational disease and claim for compensation, alleging that he experienced nausea, headaches, emotional and vision problems, and discharged blood from his anus and mouth as a result of his exposure to chemicals at work, including the chemical trichloroethane. On July 3, 1975 appellant was notified that he would be reassigned and promoted to the position of a supply clerk, GS (general schedule) 2005-5, step 10, ($6.38/hour) due to his physical complaints resulting from chemical exposure. Appellant was subsequently reassigned to the position of an industrial management relations specialist, GS-7, step 10, ($6.53/hour) and held this position on July 20, 1977 when his retained pay expired. Appellant filed a claim on November 7, 1977 for loss of wage-earning capacity for the period commencing July 20, 1977, initially alleging that he developed bronchitis and possible chronic hepatitis, and experienced mental relapses, abdominal pain and a nervous condition due to his exposure to chemicals at work. In supplemental statements appellant alleged that he experienced difficulty with breathing, memory loss, pain on the right side, dizziness and neck problems, stating that he had experienced these problems in 1974.

On remand, the Office prepared a statement of accepted facts and referred appellant with the case record, to Dr. Enoch G. Dangerfield, to determine the relationship of appellant's current condition with his employment factors, and to determine the extent and degree of any employment-related disability. In a report dated October 18, 1982 Dr. Dangerfield concluded that appellant had developed an emotional condition which was causally related to his exposure to chemicals. The doctor explained that appellant developed phobic symptoms which were associated with anxiety and anxiety-related symptoms, and that his condition "was a symbolic exposure to a situation which he feared," *i.e.*, chemical exposure. The doctor concluded, therefore, that appellant's "symptoms of anxiety did cause him discomfort and psychological pain."

An Office medical adviser reviewed the record on February 11, 1983 and concluded that appellant had sustained an anxiety neurosis and phobia of his work environment due to chemical exposure. However, he concluded further that this condition did not disable appellant from his position as a production controller.[3] In response to an Office request for clarification, Dr. Dangerfield replied that appellant's "disability decreased significantly after he was removed from the specific phobic stimulus." The doctor further replied that he was unable to address whether appellant's phobic anxiety reaction continues to exist.

By letter of August 18, 1983 the Office advised appellant that it had accepted that his employment factors resulted in a "phobic and anxiety reaction of temporary but presently unknown duration," since the evidence of record did not indicate that the condition disabled appellant from performing as a production controller; therefore, compensation was not payable.

After requesting and securing additional information from the employing establishment regarding appellant's chemical exposure, the Office requested clarification from Dr. Dangerfield. Dr. Dangerfield replied on January 31, 1984 that he was unable to estimate when appellant's psychiatric effects from his exposure to chemicals ceased.

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[3] Effective November 20, 1977 appellant was reassigned to the position of a production controller, GS-7, step 10. Appellant retired on disability effective October 1, 1982.

An Office medical adviser opined that appellant had reached maximum medical improvement from his phobic reaction by October 1982.

By compensation order dated May 8, 1984 the Office denied appellant's claim on the ground that the medical evidence of record did not establish that appellant had an employment-related injury or emotional condition resulting in disability for work.

Appellant, through his attorney, requested a hearing before an Office hearing representative. By a compensation order dated September 13, 1984 the Office vacated its May 8, 1984 decision. In an accompanying memorandum the Office hearing representative found that Dr. Dangerfield's report was not sufficient to resolve the issues of the case as he admitted that he was unable to estimate when "all of" appellant's "psychiatric effects ceased," and did not know whether appellant's "past employment caused any permanent or continuing effects." Accordingly, the hearing representative remanded the case for further development including a referral of appellant to another specialist for an examination and opinion.

On remand the Office prepared a statement of accepted facts and referred it, appellant and the case record to Dr. George R. Greer, a Board-certified psychiatrist. Dr. Greer evaluated appellant and other family members on December 26, 1984 and in an extensive and thorough report dated January 21, 1985 concluded that appellant had an employment-related phobic anxiety reaction which was causally related to his exposure to chemicals at work and disabled him from performing the duties of a production controller. Dr. Greer explained that appellant sustained a post-traumatic stress disorder caused by the chemical exposure, thereby resulting in organic brain damage; that this condition resulted in an organic personality syndrome because of appellant's belief he was "poisoned" by the exposure; that the organic brain damage was permanent and the post-traumatic stress disorder was temporary; and that appellant's prognosis was "poor" since he had "suffered from this disorder for several years with no improvement in psychological functioning even since he stopped working."

Dr. John Z. Sadler, a consulting psychiatrist, essentially concurred in Dr. Greer's report.

By letter dated May 16, 1985 the Office advised appellant that it had accepted his conditions of organic personality syndrome and post-traumatic stress disorder as employment related. It further advised appellant, that before it could authorize compensation payments, it was necessary for it to secure his payrate information from the employing establishment.

Based on the information secured by the employing establishment, the Office determined that appellant retired on October 1, 1982 from his position as a production controller,[4] GS-7, step 10, which at that time paid an annual salary of $20,701.00. The Office determined that appellant was entitled to compensation benefits for temporary total disability effective October 1, 1982 and continuing at the monthly compensation rate of $1,194.30, and a weekly rate of $298.58. Appellant was advised of this by letters of May 5, 1986 and August 18, 1986.[5]

In letters received by the Office on November 4, 1985 and September 5, 1986, appellant requested a schedule award and "dependent benefits." Appellant also proposed a monetary amount at which he should be compensated. By "letter decision" of September 12, 1986 the Office advised appellant that he was not granted a schedule award for a scheduled member and that it was unclear how he arrived at his proposed monetary amount of compensation. The Office advised appellant that he was receiving compensation benefits based upon his salary at the time of retirement, and pointed out that this was the maximum amount he was entitled to. Appeal rights were attached.

In a September 12, 1986 letter appellant requested an increase in his basic compensation rate as provided in 5 U.S.C. section 8113(a)(1) and (2), in that his brain injury served to deprive him of career advancement and accordingly, his compensation rate was not adequate restitution for the malady suffered. Appellant again proposed a monetary amount he deemed appropriate. In a subsequent letter appellant reiterated his previous request, and formally requested a schedule award for brain damage. Appellant requested a hearing before an Office hearing representative.

By compensation order dated November 14, 1986 the Office vacated its September 12, 1986 decision. In an accompanying memorandum, the second Office hearing representative stated that the Office's September 12, 1986 "letter" did not constitute a final decision either addressing whether appellant was entitled to an increase in his base compensation rate under 5 U.S.C. section 8113, or whether he was entitled to a schedule award for permanent damage to his brain resulting from exposure to chemicals. The hearing representative remanded the case for an issuance of a final decision with respect to these issues.

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[4] Appellant was reassigned from the position of an industrial management relations assistant, GS-7, step 10, to a production controller, GS-7, step 10, on November 20, 1977 at an annual salary of $16,035.00.

[5] Appellant elected to receive compensation benefits provided by the Federal Employees' Compensation Act; such election became effective on May 9, 1986. The Office reimbursed the Office of Personnel Management for the benefits it had paid appellant prior to the election.

On remand, the Office issued a compensation order dated February 4, 1987, which incorporated by reference a memorandum to the Director, denying appellant's claims on the grounds that appellant's "condition does not meet the criteria for a schedule award and that the claimant himself does not fit the criteria for an increase in his basic compensation rate."

The Board finds that the evidence does not establish that appellant is entitled to additional compensation benefits.

Section 8113 of the Federal Employees' Compensation Act,[6] with respect to an increase or decrease of basic compensation, provides in pertinent part as follows:

> "(a) If an individual—
>
> > (1) was a minor or employed in a learner's capacity at the time of injury; and
> >
> > (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity."

The Board has held that the Act "contemplates but *one* probable increase in wage-earning capacity upon the learner's completion of training or the minor's reaching the age of majority," [7] *i.e.*, 21 for applicability of these provisions of the Act. (Emphasis in the original).

With respect to appellant's status, the Board notes that in the instant case, appellant was 33 years of age when he filed his claim for compensation benefits. As he was over the age of 21 at the time he was exposed to chemicals at work, the Board finds that he was not a minor "at the time of injury." Thus, that portion of 5 U.S.C. section 8113(a)(1) is not applicable to appellant's case.

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[6] 5 U.S.C. section 8113.

[7] *Dorothea Creager*, 20 ECAB 18, 25 (1968).

The Board further finds that appellant was not employed in a learner's capacity at the time of his injury.

In *Carter C. Swinson*, the Board first delineated the circumstances under which an employee would be considered to be in a learner's capacity. In finding that the employee in that case, who was rerated as a "helper-machinist, trainee" on December 8, 1941, was not in a learner's capacity when he was injured on December 19, 1941, the Board stated:

> "The employing establishment advised that in 1941 the only formal training program for machinists was the apprenticeship program in which appellant was not enrolled; that the job classification of 'helper-machinist' was not an 'in-training' position; that while some helpers were promoted to machinists on the basis of demonstrated ability, the majority were not so advanced; that there was no specified period in which a helper-machinist attained the rating of a machinist as this depended upon the individual's qualifications and recommendation of his department; and that appellant's rerating of December 18, 1941, was based on satisfactory completion of periods of work as a helper rather than because of any advancement under a formal or informal training program.
>
> "There is nothing in the official records to establish that appellant's designated job was anything other than that of 'helper-machinist' when injured. Even though the facts and affidavits presented may warrant a finding that at the time of the injury he was designated a 'trainee,' it does not follow that such a designation or the designation 'helper' is sufficient to render him a 'learner' within the meaning determinative of the issue. Nor does the fact that the employee was engaged in an unskilled job, which may or may not ultimately lead to a position in a semiskilled or skilled craft, bring him within the contemplation of the term 'learner' as used in the Act. A 'learner' under the Act does not contemplate a category in which the worker can remain for the rest of his life. According to the record appellant's job was such that he could have remained at this 'helper-machinist, maximum' rating for an indefinite period, or, in fact, the remainder of his life." [8]

In *James L. Parkes*, the Board further described the circumstances under which an employee would be considered to be in a learner's capacity. In finding that the employee in that case, who was employed as a research analyst, was not in a learner's capacity, the Board stated:

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[8] 10 ECAB 281, 281 (1958)

> "He was not a participant in a formal training program with a specified period for completion upon which he would have automatically moved to a higher grade; he could have remained at the same GS grade level for an indefinite period and any advancement achieved would have been contingent upon his proven ability, past experience, or other qualifications. Appellant's status was no different from any other regular employee in that the opportunity for advancement to a higher grade was dependent upon demonstrated ability, merit, and availability of job. The circumstances here do not warrant a finding that he was a 'learner' so as to entitle him to an increase in the 'monthly pay' upon which to compute compensation for his disability." [9]

In the instant case, appellant was employed as an electromechanical instrument and controls repairer, WG 9, Step 4, on August 21, 1974 when he filed his claim for compensation benefits resulting from exposure to chemicals at work. At the time of his disability retirement on October 1, 1982, appellant was a production controller, GS-7, Step 10; a position he had held since November 20, 1977. Appellant's monthly compensation rate was based on ¾ of his salary [10] in the position he occupied the date his disability began, October 1, 1982.[11] As in the *Parkes* case, appellant was not a participant in a formal training program with a specified period for completion, at which time he would have automatically been promoted to a higher grade. Moreover, as appellant had been within grade for almost five years prior to his retirement, he could, conceivably, have remained at the same grade level "for an indefinite period and any advancement achieved would have been contingent upon his proven ability, past experience, or other qualifications." [12] Therefore, appellant's status was not any different from any regular employee in that the opportunity for advancement to a higher grade was dependent on his demonstrated ability, merit, and the availability of a position.[13] The Board finds, therefore, that the circumstances in the present case do not warrant a finding that appellant was a "learner" so as to entitle him to an increase in the "monthly pay" upon which to compute compensation for his disability.[14]

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[9] 13 ECAB 515, 517 (1962).

[10] Since appellant had dependents, his compensation was based on 75 percent of $398.10 or $298.58. *See* 5 U.S.C. sections 8105 and 8110.

[11] 5 U.S.C. section 8101(4). *See e.g.*, *George A. Phillips*, 38 ECAB 513 (1987); *Linwood D. Holmes*, 35 ECAB 792 (1985).

[12] *James L. Parkes*, *supra*, note 9. *See also Robert Allan*, 30 ECAB 1154 (1979).

[13] *Id.*

With respect to the second issue, the Board finds that appellant is not entitled to a schedule award for a brain disorder.

Based on the weight of the medical evidence of record, as represented by the medical opinion of Dr. Greer, a Board-certified psychiatrist, the Office accepted appellant's claim for organic personality syndrome and post-traumatic stress disorder resulting from his exposure to chemicals at work. Consequently, effective October 1, 1982, the Office began paying appellant compensation benefits for temporary total disability. As a result of the Office's acceptance of appellant's claim, appellant alleged that he was entitled to a schedule award for an impairment to the brain or brain disorder.

A schedule award is not payable for the loss or loss of use, of a part of the body not specifically enumerated in the Act.[15] This is applicable equally to body members which are not enumerated in the schedule provision as it read before the 1974 amendment and to organs which are not enumerated in the regulations enacted pursuant to the 1974 Amendments.[16]

Appellant's exposure to chemicals at work resulted in an organic personality syndrome and post-traumatic stress disorder, which Dr. Greer concluded resulted in organic brain damage. However, since the brain is a portion of the body not listed in the schedule or in the organs listed in the related regulations, the Board finds that appellant is not entitled to a schedule award for a brain disorder.[17]

The decision of the Office of Workers' Compensation Programs, dated February 4, 1987, is hereby affirmed.[18]

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[14] *Id., Carter C. Swinson*, supra note 8.

[15] *See William Edwin Muir*, 27 ECAB 579 (1976). *See also Theodore M. Demko*, 19 ECAB 313 (1968).

[16] *William Edwin Muir, supra*, note 15. *See also* 20 C.F.R. section 10.304 and 88 Stat. 1143, section 4.

[17] *See Theodore M. Demko, supra*, note 15.

[18] The Board notes that compensation in this case would only be payable under the Act to the extent that injury-related impairment diminished appellant's capacity to earn wages and not on the basis of pain and suffering or physical impairment. *See James F. Bryson*, 25 ECAB 127 (1974). The Board further notes the Office was in the process of determining whether appellant had a loss of wage-earning capacity prior to October 1, 1982, i.e., beginning July 20, 1977. The Office has not issued a final decision with respect to this aspect of appellant's case.

In the Matter of CATHERINE ADAMS *and* DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR FORCE BASE, Ohio

Docket No. 87-1814; Submitted on the Record;
Issued May 10, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited $33,790.35 in compensation for the periods May 10, 1977 through April 28, 1979, September 25, 1980 through September 24, 1981 and December 12, 1981 through December 13, 1982; (2) whether the Office properly determined that appellant was not without fault in receiving a $33,790.35 overpayment in compensation for the above-mentioned periods and a $833.00 overpayment in compensation for the period from April 1, 1976 to October 31, 1976; and (3) whether appellant had any disability after May 11, 1986, the date the Office terminated compensation, due to her January 19, 1973 employment injury.

On January 19, 1973 appellant, then a 39-year-old linen control clerk, developed pain in her right groin and back while lifting bundles of sheets out of a cart. Dr. Darrell C. Caudill initially diagnosed a right inguinal hernia. Appellant underwent a right inguinal herniorrhaphy on February 13, 1973. In a May 18, 1973 report, Dr. George Baujan, a family practitioner, diagnosed lumbar muscle spasm and a left sciatic neuritis. He related appellant's back condition to her January 19, 1973 employment injury. Dr. Baujan repeated his diagnosis in subsequent reports. The Office of Workers' Compensation Programs accepted appellant's claim for right inguinal hernia and chronic lumbosacral sprain and began payment of temporary total disability compensation effective January 26, 1973.

Appellant returned to work on July 2, 1973 but stopped working on August 7, 1973 alleging a recurrence of disability. She returned to work on October 1, 1973 but stopped working on March 18, 1974, alleging another recurrence of disability. She did not return to work thereafter.

The Office paid temporary total disability compensation for the period August 8, 1973 to September 29, 1973 and commencing March 18, 1973. In an April 18, 1973 letter the Office informed appellant that she would begin to receive automatic, periodic payment of compensation. The Office informed appellant that if she returned to her former job or obtained other employment she was required to inform the Office at once. The Office instructed her return to the Office any compensation checks she received after she resumed work.

In a May 3, 1978 letter, the Office requested that appellant complete a CA-1032 form, reporting all employment for the prior 12 months. In a May 9, 1978 response, appellant submitted the CA-1032 form, leaving blank the space for reporting employment. Appellant submitted another CA-1032 form which she dated April 28, 1979. She again left blank the space for reporting employment. The year of the Office's letter requesting that she complete the CA-1032, however, was obscured.[1] Appellant submitted a September 24, 1981 CA-1032 form in which she wrote "none" in the space for reporting employment.

In a May 20, 1980 report, Dr. Arun Ram Ginde stated that appellant's lumbosacral strain had been exacerbated over the prior few weeks with right side sciatica. He ruled out a herniated disc.

In a June 20, 1980 report, Dr. William H. Donahue, an osteopath, stated that it appeared that appellant had recovered satisfactorily from the January 19, 1973 employment injury. He indicated that appellant could perform sedentary work or return to her former position.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard M. Ward, a Board-certified orthopedic surgeon, for examination. In a June 12, 1980 report, Dr. Ward diagnosed a chronic ligamentous strain which was caused by the January 19, 1973 employment injury and aggravated by an automobile accident on July 16, 1979. He commented that appellant had a marked functional overlay which was not a result of the January 19, 1973 injury but rendered it difficult to determine the portion of the back pain due to the January 19, 1973 employment injury and the portion due to the July 16, 1979 accident.[2]

An Office medical adviser, in a November 3, 1980 memorandum, stated that Dr. Ward's diagnosis of chronic lumbosacral sprain was based on history and subjective complaints rather than objective findings. He recommended a further referral of appellant to clarify the situation.

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[1] An official of the Office subsequently indicated that this particular CA-1032 form was issued on April 23, 1980.

[2] An Office medical adviser identified Dr. Ward as an impartial specialist. The record, however, does not show that there was any conflict in medical evidence prior to appellant's referral to Dr. Ward.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David B. Heller, a Board-certified orthopedic surgeon, for an examination. Appellant was examined by Dr. Robert Po, a Board-certified orthopedic surgeon and Dr. Heller's associate. In a March 24, 1982 report Dr. Po diagnosed chronic low back strain with back pain. He indicated that appellant's subjective symptoms were out of proportion to the objective findings. He noted that a computerized axial tomography, a myelogram and electromyograms (EMG) had been normal in the past. He stated that the lumbosacral strain was a result of the January 19, 1973 work injury.

In a July 27, 1982 report, Dr. Dwight Jacobus, an osteopath, indicated that appellant had been hospitalized with a history of longstanding back pain which began due to an employment injury. He diagnosed lumbosacral myositis, marked psychological overlay and acute anxiety depression. He stated that he did not find signs of compromise.

In an August 14, 1982 memorandum, a second Office medical adviser stated he did not accept that appellant's current lower back complaints were causally related to appellant's employment injury. He pointed out that neither Dr. Po nor Dr. Jacobus found any objective findings. He also noted that normal EMG, myelogram and CAT scan supported a conclusion of no major low back problem.

The Office, with appellant's authorization, requested an earnings statement for appellant from the Social Security Administration for the period January 1976 to December 1980. The Social Security Administration reported that from April to June 1976, appellant earned $356.50 working for Kelly Labor Division; in the period April to September 1976 she earned $887.61 working for Fourjay Industries Inc.; in 1976, 1977 and 1978 she earned $1,379.30 working for Brainerd Manufacturing Co.; in 1977 she earned $242.40 working for Gem City Engineering Co. and Mechaneer Inc.; in 1978 she earned $62.00 working for Kroger Co., $42.63 working for Stop-N-Go of Dayton, Inc., $66.26 working for Energy-Vent Inc., $31.64 working for McDonalds and $96.96 working for Columbia Sussex Corp.; in 1979 she earned $703.50 working for Kurz Kasch Inc., $142.83 working for Burger King, $309.90 working for Shopsmith Inc. and $603.69 for Triangle Engineering Co.; and in 1980 appellant earned $77.50 working for Dolly Toy Co.

In a November 4, 1982 memorandum, an Office official indicated that the case was being referred to the Office of the Inspector General. The official noted that four CA-1032 forms had been issued, dated May 3, 1978, April 23, 1980, September 22, 1981 and November 2, 1982. She reported that the first three had been returned signed and dated May 9, 1978, April 28, 1979 and September 24, 1981, respectively. She pointed out that the second CA-1032 had been incorrectly dated by appellant. Appellant subsequently submitted the fourth CA-1032, dated December 13, 1982, again leaving blank the space for reporting employment for the prior 12 months. The Office returned the form to appellant to complete the blank space. Appellant wrote "none" in the blank space and returned the form.

In a December 10, 1982 investigative report an investigator from the employing establishment indicated that after reviewing the Social Security Administration report of appellant's earning, he had verified 13 of the 15 jobs reported, developed information on an additional four jobs and verified two of those jobs. He reported that in applying for one position, appellant had listed prior employment with Argont Ind. from January 1972 to January 1973 and with Projects Unlimited through Kelly Girls from February to May 1975. He confirmed that she worked at Argont Electra Inc. from June 18 to June 22, 1973. He indicated that Projects Unlimited and Kelly Girls reported that their records did not go back to 1975 or 1976 when the Social Security Administration indicated that appellant was working for Kelly Girls. The investigator stated that appellant worked at Fourjay Industries Inc. from June 9, 1976 through August 16, 1976; at Brainerd Manufacturing Co. from August 16 to August 27, 1976, from March 16, 1977 through May 11, 1977 and from January 24, 1978 to March 8, 1978; Gem City Engineering Co. from June 13 to June 30, 1977; at Mechaneer Inc. from November 14, 1977 to December 9, 1977; at Energy-Vent Inc. from January 4 through January 6, 1978; at Kroger Co. from April 5 to April 8, 1978; at Days Inn of Richmond, a subsidary of Columbia Sussex Corp, for two weeks beginning September 25, 1978; a Stop-N-Go for one to two days in December 1978; at Shopsmith Inc. from January 4 through January 30, 1979; at two different Burger King restaurants from October 7, 1978 to December 30, 1978, January 29, 1979 to March 2, 1979, March 16 to March 18, 1979 and April 15, 1979 to May 5, 1979; at Kurz-Kasch from June 11, 1979 to July 16, 1979 when she was involved in an automobile accident; at McDonald's for one to two days in October 1979; and at Dolly Toy Co. from August 12 to August 28, 1980. At the latter employing establishment, appellant reported that she worked at Triangle Engineering Co. from January 1979 through September 1979. The investigator did not provide any other information concerning appellant's reported employment at Triangle Engineering Co.

In a December 16, 1982 report, Dr. Edward A. Hubach, an osteopath, indicated that during appellant's hospitalization in July 1982 a repeat EMG and CAT scan were again normal. He stated that he and Dr. Jacobus concluded that appellant had lumbosacral myositis and chronic lumbosacral strain but did not have any evidence of neurological compromise. He reported that in this hospitalization, as well as in previous examination, appellant's subjective complaints seemed out of proportion to the actual physical findings.

In a July 6, 1983 report, Dr. Po stated that appellant's condition at the time of his March 17, 1982 examination was not causally related to her January 19, 1973 injury. He commented that his diagnosis of the injury-related condition would be low back strain but he reported that he found no physical impairment related to the January 19, 1973 injury. He concluded that the work-related condition had resolved. In an August 2, 1983 report, Dr. Po repeated his conclusions and added that appellant's work-related condition resolved in 1981.

In a June 23, 1983 decision, the Office found that appellant's compensation for the period from April 1, 1976 to December 31, 1980 was forfeited on the ground that she knowingly omitted her earnings from the CA-1032 forms she submitted. In a June 23, 1983 preliminary decision the Office found that appellant had received a $35,302.21 overpayment in compensation for the period from April 1, 1976 to December 31, 1980 because she received temporary total disability compensation during the same period that she was gainfully employed. The Office found that appellant was at fault in the matter because she failed to report her earnings as required and she knew or should have known that she was not entitled to compensation for total disability during the time she was able to work. The Office informed appellant that she had the right to submit any evidence or arguments if she disagreed with the amount of the overpayment, disagreed that the overpayment occurred or believed that the overpayment occurred through no fault of her own. The Office also informed appellant of her right to a hearing before an Office hearing representative. The Office subsequently stated that the actual sum of the overpayment was $35,326.21.

The Office subsequently received another earnings statement from the Social Security Administration for the period January 1973 through June 1983. The earnings statement provided the same information as contained in the previous statement. The statement also indicated that appellant worked for Argent Industries Inc. in 1973 earning $49.50 and worked for Pinkertons Inc. during the period October 1973 to March 1974, earning $240.50.

The statement did not show any employment after appellant's employment with the Dolly Toy Co. in 1980. The statement contained the warning that social security records may not show all earnings reported for periods ending after December 1981 due to the time required to receive and process reports.

In a November 23, 1983 decision the Office found that its preliminary decision that appellant was at fault in the matter of the overpayment was correct.

Appellant requested a hearing before an Office hearing representative. In a July 3, 1984 decision the hearing representative vacated the Office's November 23, 1983 decision. He stated that the Office's declaration of a forfeiture for the entire period of April 1, 1976 to December 31, 1980 was not in accordance with Office procedures because it extended beyond the periods covered by the CA-1032 forms signed and submitted by appellant. He stated the forfeiture of compensation may be declared for the periods of May 10, 1977 through May 9, 1978, April 29, 1979 through April 28, 1980 and September 25, 1980 through September 24, 1981. He further stated that periods not covered by forfeiture should be amended to reflect appellant wage-earning capacity for those periods. He directed the Office to recalculate the overpayment into two amounts, one reflecting the overpayment based on appellant's wage-earning capacity and one reflecting the overpayment for the periods in which a forfeiture had been declared.

In a September 4, 1984 preliminary decision, the Office found that appellant had received a $33,790.35 overpayment in compensation because she was receiving temporary total disability compensation during the same period she was gainfully employed. The Office further found that appellant was with fault in the matter because she should have known she was not entitled to compensation for the periods she was employed. The Office stated that the failure to report earnings resulted in forfeiture of compensation for the following periods covered by her signed CA-1032 wage and dependency forms: May 10, 1977 to April 28, 1979; September 25, 1980 to September 24, 1981; and December 12, 1981 to December 13, 1982. Appellant requested a prerecoupment hearing.

In an October 11, 1984 preliminary decision, the Office found that appellant had received an $833.00 overpayment in compensation because she received compensation for temporary total disability while she was employed during the period April 1976 to October 1976. The Office further found that appellant was at fault in the matter because she should have known that she was not entitled to compensation for total disability while working. Appellant requested a prerecoupment hearing in regard to the October 11, 1984 decision.

The Office received an October 13, 1984 report which stated that appellant had a normal lumbar CT scan. In a December 16, 1984 report Dr. Jacobus indicated that appellant was hospitalized from November 15 to November 20, 1984 for acute lumbosacral myositis.

In an October 16, 1985 decision an Office hearing representative returned the case to the Office without a hearing for a determination of whether appellant had any disability remaining due to the employment injury.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. J. Michael Dolibois, a Board-certified orthopedic surgeon, to resolve the conflict between Dr. Po and Dr. Baujan. In a February 17, 1986 report Dr. Dolibois noted that x-rays of the pelvis and the lumbosacral spine were essentially normal. He stated:

> "Impressions: On the surface this lady certainly seems to be severely functionally impaired. Her examination and x-rays however fail to demonstrate a significant objective physical finding to explain her marked subjective symptoms. True sciatica should not cause tenderness in distant parts. It should alsc cause neurological deficit which follows a dermatomal pattern. This lady exhibits neither of these. Her only positive objective finding in my mind is the apparent depressed ankle jerk on the left but the history of a negative CAT scan and negative electromyographic studies would tend to make it very unlikely that she would still have a discogenic lesion responsible for these findings.
>
> "In short, it is my belief that the majority of this lady's symptoms are functional in origin rather than based on pathologic physiology."

The Office referred appellant, together with a statement of accepted facts and the case record to Dr. Edmond J. Gould, a Board-certified psychiatrist. In an April 3, 1986 report, Dr. Gould stated that appellant did not currently suffer from any significant psychiatric disorder. He reported that he did not detect the presence of any psychiatric impairment which would be likely to impair her ability to function in daily activities or in a work situation. He commented that he had no reason to believe that appellant's January 19, 1973 employment injury caused, aggravated, precipitated or accelerated any psychiatric condition.

In an April 9, 1986 report Dr. Jacobus again indicated that no abnormalities were noted on examination that would refer to her root compromise. He stated that he found no sign of neurologic deficits or of a herniated nucleus pulposus. He commented that most of appellant's complaints were more subjective than objective.

In an April 24, 1986 letter decision the Office terminated appellant's compensation effective May 11, 1986 on the ground that the weight of the medical evidence established that disability due to the January 14, 1983 injury had ceased. Appellant requested a hearing before an Office hearing representative.

Appellant submitted an August 5, 1986 report from Dr. Mark A. MacNealy, an osteopath, who diagnosed a chronic L4-L5 nerve root irritation and chronic pain syndrome. He recommended additional tests. She also submitted an October 30, 1986 report by Dr. Richard E. Plumb, an osteopath, who referred to an August 15, 1973 EMG. He diagnosed chronic L4-L5 nerve root irritation, chronic pain syndrome and fibromyositis of the lumbar spine. In addition appellant submitted a July 17, 1986 report and a November 4, 1986 report from Dr. Philip J. Gigeau, a psychologist, who diagnosed a generalized anxiety disorder in a passive-aggressive personality. In his first report, he stated that the condition was associated with loss of compensation. He stated in his second report that appellant might be capable of performing some type of work but concluded that it was unlikely that she could return to nursing due to the associated physical and emotional stress.

The Office received a December 15, 1986 report from Dr. David F. Mitchell, a Board-certified physiatrist. He reported that an EMG of the lumbar spine and the left leg was essentially normal. The Office also received a December 10, 1986 report that a CT scan of the L3 through S1 levels was negative.

At the December 9, 1986 hearing, appellant denied that she worked at any time during the period involved for any of the companies identified by the Social Security Administration. She claimed that at one time her social security card was stolen. She stated that she still had severe back pain which prevented her from working.

In a June 18, 1987 decision, the Office hearing representative found that appellant was not telling the truth when she testified that she had not worked at any of the jobs shown on the social security reports. He affirmed the Office's decisions that appellant had overpayments of \$33,790.35 and \$833.00; was at fault in the creation of these overpayments; and the affirmed Office's decision to terminate compensation effective May 11, 1986.

Section 8106(b) of the Federal Employees' Compensation Act,[3] in pertinent part, provides as follows:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at times the Secretary specifies.
>
> "An employee who—
>
> "(1) fails to make an affidavit or report when required; or
>
> "(2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."

The Board finds the Office properly determined that appellant forfeited her right to compensation for the period May 10, 1977 through May 9, 1978.

The Office, in a May 3, 1978 letter, instructed appellant to complete a CA-1032 form, reporting all employment for the prior 12 months. In a May 9, 1978 response, appellant left blank the space provided for reporting employment. However, the December 10, 1982 investigative report from the Air Force Office of Special Investigations showed that appellant worked for 13 different employers for various periods between March 16, 1977 and August 18, 1980. This information on appellant's employment was supported by reports from the Social Security Administration which showed that appellant had earnings during the periods in question from work at Brained Manufacturing Co., Gem City Engineering Co., Mechaneer Inc., Energy-Vent Inc. and Kroger Co. As appellant was employed during the period covered by the first CA-1032 and failed to report such employment despite being informed by the Office that she was required to do so, she forfeited her right to compensation for the period May 10, 1977 to May 9, 1978.[4]

The Board finds however that the Office's decision regarding forfeiture of compensation for the period from May 10, 1978 to April 28, 1979 is not in posture for decision.

Appellant submitted a CA-1032 form, signed and dated April 28, 1979 in which she did not report any income for the prior year.

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[3] 5 U.S.C. section 8106(b).

[4] *Peter L. Jackson*, Docket No. 86-1844 (issued December 30, 1986).

However, in a November 4, 1982 two-way memorandum, an official from the Office stated that this particular CA-1032 was issued April 23, 1980 and dated incorrectly by appellant. The Board notes that the issue date on the copy of this CA-1032 contained in the record submitted on appeal is scratched out. The Board therefore is unable to determine whether the proper period of forfeiture should be from May 10, 1978 to April 28, 1979 or from April 29, 1979 to April 28, 1980. As noted above, appellant worked intermittently from March 16, 1977 through August 18, 1980. She therefore would forfeit her right to compensation under either period in question because she failed to report her employment despite being informed by the Office that she was required to do so. However, in any period not covered by a CA-1032 report, appellant would forfeit compensation only for those days that she was employed and did not report such employment as required by the Office's April 18, 1974 letter.[5] The case must be remanded for a determination of whether appellant forfeited compensation for the period May 10, 1978 to April 28, 1979 or April 29, 1979 to April 28, 1980.

The Board further finds that the Office improperly determined that appellant forfeited compensation for the periods September 25, 1980 through September 24, 1981 and December 12, 1981 through December 13, 1982.

In CA-1032 forms dated September 24, 1981 and December 13, 1982, appellant did not indicate that she had any employment for the respective 12-month periods prior to each report. The December 10, 1982 investigative report indicated that the last reported date of employment for appellant was August 16, 1980 at Dolly Toy Co. The Social Security Administration did not report any income received by appellant after 1980. There is no evidence of record which shows that appellant was employed after August 16, 1980. The Office's decision that appellant should forfeit compensation for failure to report employment during the periods of September 25, 1980 through September 24, 1981 and December 12, 1981 through December 13, 1982 are not supported by the evidence of record and must be reversed.

The Board finds that appellant was not without fault in receiving an overpayment of compensation in 1976 because she should have known that she was not entitled to compensation for temporary total disability while working.

Section 8129(a) of the Act provides that when an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b):[6]

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[5] *Lorand A. Hegedus*, 37 ECAB 162 (1985); *Margaret H. Wester*, Docket No. 87-284 (issued December 31, 1987).

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [the Federal Employees' Compensation Act] or would be against equity and good conscience."

In order to qualify for this exception, the recipient of an overpayment of compensation must be without fault. If he is not, there is no basis for waiving the overpayment, and adjustments shall be made.

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show an incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect, (b) Failure of the payee to furnish information which the payee knew or should have known to be material; (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [7]

The Office applied the third standard in finding that appellant was at fault in creating an overpayment in 1976.

The Office, in its April 18, 1974 letter, instructed appellant to report whenever she obtained employment and to return any compensation check she received when she returned to work. Appellant therefore knew or should have known that she was not entitled to temporary total disability compensation for periods she was working in 1976. She therefore was at fault in the creation of this overpayment.

The case however must be remanded for a redetermination of the period of the overpayment and the amount of the overpayment.

The Office stated that the period of the overpayment was from April 1976 to October 1976. The Office apparently derived this period from the report of the Social Security Administration which indicated that appellant received $356.50 from Kelly Labor Division Inc. between April 1 and June 30, 1976 and $887.61 from Fourjay Industries Inc. between April 1, 1976 and October 31, 1976. The December 10, 1982 investigative report showed that Kelly Labor Division Inc. did not retain its records concerning appellant's employment during this period. The Office therefore acted reasonably in assuming that appellant had started working on April 1, 1976 based on the Social Security Administration report. The December 10, 1982 investigative report, however, shows that appellant worked for Fourjay Industries Inc. from June 9, 1976 to August 16, 1976. She was then employed by Brained Manufacturing Co. from August 16 to August 27, 1976. There is no evidence that appellant worked between August 27, 1976 and October 31, 1976. The Office therefore should redetermine the relevant period in which the overpayment occurred.

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[6] 5 U.S.C. section 8129(a) & (b).

[7] Pursuant to *Califano* v. *Yamasaki*, 422 U.S. 682, 99 S. Ct. 2535, (1979) the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments, Part 2—Claims.

The Office also erred in its procedure in calculating appellant's overpayment for the period in question. The Office calculated the amount of the overpayment by determining that appellant had a 75 percent loss of wage-earning capacity based on the actual earnings she received from April 1, 1976 to October 13, 1976. The Office then subtracted the amount of compensation appellant would have received for a loss of wage-earning capacity from the amount she actually received for temporary total disability compensation from April 1, 1976 to October 13, 1976. However, as pointed out above, the evidence of record shows that appellant was not employed beyond August 27, 1976. The period of the overlap between appellant's employment and her receipt of temporary total disability compensation will affect the amount of the overpayment. Also, the Office, in using appellant's actual earnings, stated that the actual earnings did not reflect appellant's wage-earning capacity. Under 5 U.S.C. section 8115, the Office, in calculating a claimant's wage-earning capacity, can use a claimant's actual earnings only if they fairly and reasonably represent his wage-earning capacity. As the Office specifically found that appellant's actual earnings during the period did not fairly and reasonably represent her wage-earning capacity, the Office should have used the other procedure provided by section 8115, basing appellant's wage-earning capacity on the availability of suitable employment on the open labor market, taking into consideration appellant's injury, age, degree of physical impairment, her usual employment and her qualifications for other employment.[8]

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[8] *James R. Dorris*, 30 ECAB 979 (1979).

The Board finds that the weight of the medical evidence establishes that appellant's disability due to her January 19, 1973 employment injury ceased by May 11, 1986.

Once the Office accepts a claim and begins payment of compensation, it has the burden of establishing that the condition for which compensation has been paid has ceased or is no longer causally related to appellant's employment.[9] The Office has met that burden here.

The Office accepted appellant's claim for chronic lumbosacral joint strain. Dr. Baujan, a family practitioner, stated in several reports that appellant's chronic lumbosacral strain was causally related to her January 19, 1973 employment injury. In a June 12, 1980 report, Dr. Ward diagnosed a chronic ligamentous strain which he related to the January 19, 1973 employment injury. An Office medical adviser, however, stated that Dr. Ward's diagnosis was based only on history and subjective complaints rather than objective findings. Dr. Po diagnosed a chronic low back strain. He stated however that appellant's subjective symptoms were out of proportion to the objective findings, noting that a CAT scan, a myelogram and EMGs were normal. He subsequently stated that appellant's condition at the time of his examination was not related to the employment injury. He indicated that the work-related condition had resolved in 1981. Dr. Jacobus also stated that appellant had no abnormalities on examination. He reported that most of appellant's complaints were more subjective than objective. Dr. Hubach stated that appellant's subjective complaints seemed out of proportion to the actual physical findings. An October 13, 1984 report stated that appellant had a normal lumbar CT scan.

To resolve the conflict in the medical evidence, the Office referred appellant to Dr. Dolibois. Dr. Dolibois reported that he found no objective findings to explain appellant's subjective symptoms. He concluded that appellant's condition was more functional than physiological in origin.

The reports of Dr. Po, Dr. Jacobus and Dr. Dolibois, taken together, show that appellant has not had any objective findings since 1982 which would support complaints of lumbosacral pain. The record shows that several x-rays, EMG, CAT scans and a myelogram have been normal. The report of Dolibois, given in the role of an impartial specialist, is well-rationalized and is therefore entitled to special weight.[10] His conclusion that appellant's only impairments are functional and not physiological in nature establishes that appellant no longer has any physical condition causally related to her employment injury.

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[9] *See Pope D. Cox*, 39 ECAB 143 (1987).

[10] *James P. Roberts*, 31 ECAB 1010 (1980).

The Office referred to Dr. Gould as an impartial specialist. The record contains comments from Dr. Ward, Dr. Po, Dr. Jacobus and Dr. Hubach that appellant had a functional overlay. However, none of the physicians of record related this emotional condition to appellant's employment injury. There was, therefore, no conflict in the medical evidence on whether appellant's emotional condition was related to her employment injury at the time appellant was referred to Dr. Gould. Dr. Gould concluded that appellant did not have any emotional condition causally related to her employment injury and stated that she did not have any psychiatric condition which would cause disability for work. His well-rationalized report given as the only psychiatrist of record to address the issue of causal relationship, establishes that appellant does not have any emotional condition causally related to her employment. The medical reports of Drs. Po, Jacobus, Dolibois and Gould provide sufficient support for the Office's decision to terminate compensation on the ground that appellant was no longer totally disabled due to her January 19, 1973 employment injury.

Appellant submitted reports from Dr. MacNealy and Dr. Plumb who diagnosed her condition as L4-L5 nerve root irritation. Neither physician, however, related appellant's condition to her employment injury. These reports therefore are irrelevant. In addition, Dr. Plumb cited a 1973 EMG in support of his diagnosis. Subsequent EMG, CAT scans and a myelogram however have been negative, particularly Dr. Mitchell's EMG which he referred to in his December 15, 1986 report. These negative reports support the conclusion of Dr. Dolibois that appellant had no physical condition that explained her subjective complaints.

In reports dated July 17, 1986 and November 4, 1986 Dr. Gibeau diagnosed generalized anxiety disorder on a passive-aggressive personality. In his first report, he stated that this was associated with the loss of compensation. The Board has held that an emotional condition due to actions of the Office is not sustained in the performance of duty.[11]

The decisions of the Office of Workers' Compensation Programs, dated June 18, 1987 and September 4, 1984 are hereby affirmed insofar as they find that appellant forfeited compensation for the period May 10, 1977 to May 9, 1978. These decisions are set aside insofar as they find that appellant forfeited compensation for the period May 10, 1978 to April 28, 1979 and remanded for further action by the Office. The decision of June 18, 1987 is reversed insofar as it finds that appellant forfeited compensation for the periods September 11, 1980 to September 10, 1981 and December 12, 1981 to December 13, 1982. The decisions of the Office dated June 18, 1987 and October 11, 1984 are affirmed insofar as they find that appellant received an overpayment of compensation for the period beginning April 1, 1976. The case is remanded for a redetermination of the period of the overpayment and amount of the overpayment. The decisions of the Office dated June 18, 1987 and April 24, 1986 are affirmed insofar as they find that appellant had no disability after May 11, 1986 causally related to her January 19, 1973 employment injury.

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[11] *Virgil Hilton*, 37 ECAB 147 (1986).

In the Matter of KENNETH NICHOLS *and* DEPARTMENT OF THE NAVY, NAVAL ENGINEERING CENTER, Lakehurst, N.J.

Docket No. 88-590; Submitted on the Record;
Issued May 12, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has more than a 10 percent permanent impairment of the right hand for which he received a schedule award.

On September 23, 1985 appellant, then a 26-year-old sheet metal mechanic's helper, filed a claim for injuries to his right hand sustained on September 20, 1985 when a propane gas bottle fell on his hand. Appellant stopped work on the date of the injury and returned to light duty on October 17, 1985. Appellant again stopped work due to the injury on December 20, 1986 and returned to light duty on January 6, 1986 and to regular duty on January 20, 1986. Appellant's claim for traumatic injury was accepted by the Office of Workers' Compensation Programs and he received continuation of pay and compensation for the time he was off work, as well as medical benefits.

In a January 10, 1986 report appellant's treating physician, Dr. Munir Ahmed, a Board-certified orthopedic surgeon, diagnosed "dislocation of the right carpometacarpal joint; neuropraxia of the median nerve (ulnar) of the right hand," related the conditions to the September 20, 1985 employment injury, and stated that on September 20, 1985 appellant underwent an open reduction and internal fixation of the right distal thumb and on December 20, 1985 underwent a release of flexion contracture of the fifth finger of the right hand and fibrous flexor sheath volar capsulotomy with release of the volar plate, and release of adhesions to the skin.

On May 23, 1986 appellant submitted a claim for a schedule award based upon permanent impairment of his right hand.

In support of his claim appellant submitted a June 30, 1986 report of Dr. E. Fleischman, an osteopath, concerning a June 27, 1986 examination. Dr. Fleischman recounted the history he had obtained from appellant regarding the September 20, 1985 employment injury and noted that he had not reviewed appellant's medical records. Dr. Fleischman reported appellant's physical complaints as follows:

> "1. He complains of pain all around his right thumb.
>
> "2. He complains of restricted motion of his right small finger and thumb.
>
> "3. When he shakes someone's hand, he feels pain in his right thumb and right small finger.
>
> "4. He complains of numbness about his right thumb at the thenar eminence and near the scar.
>
> "5. He complains of difficulty grasping objects due to decreased strength in his thumb.
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> "6. He complains of loss of pinch strength in his right hand and difficulty grabbing metal at work.
>
> "7. Damp and cold weather increase the pain in his right thumb and the tip of his right small finger goes numb.
>
> "8. His right small finger stays bent all the time.
>
> "9. He is unable to flip change in his fingers due to loss of dexterity in his right hand.
>
> "10. Moving material at work and grasping the metal at work increase the pain in his right thumb.
>
> "11. Use of hand tools increases his pain and he has difficulty using them.
>
> "12. He complains of difficulty turning tools to sharpen them.
>
> "13. He takes aspirin when his pain persists and squeezes a ball to exercise his hand while working all day.

> "14. He relates that he is upset because of the functional loss in his right hand and his need to concentrate more in order to do simple things."

Dr. Fleischman also reported the following findings on examination: five degree loss of range of abduction of the right thumb; five degree loss of flexion of the right small finger at the PIP (proximal interphalangeal) joint; 30 degree loss of flexion of the right small finger at the DIP (distal interphalangeal) joint; flexion deformity at the PIP joint of the right small finger with a 35 degree loss of extension.

Dr. Fleischman also noted that examination of appellant's hand revealed a 2⅝-inch surgical scar, three punctate scars from pin insertion and removal, and a ⅜-inch hairline scar.

Dr. Fleischman estimated that as a result of the September 20, 1985 employment injury appellant sustained the following impairment:

> "Thirty-five percent of the right hand based on residuals of crush injury with dislocation at the right multangular joint, status post-open reduction with pin fixation and subsequent pin removal and crush injury to the right small finger status post-surgical ligamentous release with lysis of scar tissue."

On July 25, 1986 the case record was referred to an Office medical adviser, Dr. Edwin N. Beery, a physician specializing in occupational medicine, for an evaluation of permanent impairment of appellant's right thumb and right hand in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (hereafter A.M.A. *Guides*).[1] In a July 30, 1986 report Dr. Beery opined that appellant had reached maximum medical improvement and calculated an eight percent permanent impairment of the right thumb based upon the clinical findings reported by Dr. Fleischman in his June 30, 1986 report. Dr. Beery stated that it appeared from the medical records that appellant's right little finger was not injured in the September 20, 1985 employment-related accident, but was a preexisting condition.[2] Dr. Beery further stated that Dr. Fleischman based his estimate of impairment of the right hand upon impairment of both the thumb and the little finger and that he failed to explain how he arrived at his estimate of impairment which was not supported by the record. In arriving at his conclusion that Dr. Fleischman's clinical findings demonstrated an eight percent impairment of the right thumb, Dr. Beery stated that a five degree loss of extension of the carpometacarpal joint resulted in a three percent impairment of the thumb and that weakness, thenar atrophy, pain and decreased sensation resulted in a five percent impairment of the thumb, for a total impairment of the right thumb of eight percent.

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[1] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (2nd ed. 1984).

[2] Dr. Beery referred to Dr. Ahmed's November 6, 1985 progress notes in which he first mentioned appellant's little finger and diagnosed limitation of extension in the PIP joint "which he had had" and stated that such language "patently indicates" that the little finger condition preexisted the September 20, 1985 employment injury.

On August 7, 1986 the Office issued a schedule award for eight percent permanent impairment of the right thumb to run for six weeks from June 27, 1986, the date of Dr. Fleischman's examination, to August 7, 1986.

By letter dated August 18, 1986 appellant requested a hearing before an Office hearing representative. On July 23, 1986 appellant submitted a June 24, 1986 report by Dr. Alfred Hess, an osteopath, who stated that a recent electromyographic and nerve conduction study revealed persistent significant neuropraxia of the deep branch of the right ulnar nerve. On October 14, 1986 appellant submitted June 26, 1986 progress notes by Dr. Ahmed in which he indicated that appellant continued to have problems with the volnar aspect of the right hand and pain in the dorsum of the right thumb, and opined that as appellant did not wish to undergo an arthrodesis of the carpometacarpal joint "[he] will probably be left with about 50 percent permanency in regards to the hand [and i]n regards to [the] carpometacarpal joint dislocation, neoplasty of the deep branch of the ulnar nerve and the flexion deformity of the fifth finger of the PIP joint." On November 17, 1986 appellant submitted a November 6, 1986 supplemental report by Dr. Fleischman in which he commented that appellant's condition remained essentially the same as it was on June 27, 1986 and opined that the September 20, 1985 employment injury resulted in the following percentage of permanent impairment:

> "Forty-five percent of the right thumb based on residuals of crush injury with dislocation at the multangular joint, status post-open reduction with pin fixation and subsequent pin removal.
>
> "Twenty-five percent of the right small finger based on residuals of probable tendon injury involving the right small finger, status post-surgical release with lysis of scar tissue."

On January 13, 1987 a hearing was held before an Office hearing representative at which appellant testified that on September 20, 1985 a gas cylinder weighing approximately 125 pounds fell on his right hand crushing the entire hand, including the small fifth finger. Appellant testified that the September 20, 1985 injury was the only injury he had sustained to his hand (including his little finger), argued that his schedule award should be based upon permanent impairment of the right hand rather than of the right thumb, and submitted additional medical evidence in support of his claim. Medical evidence submitted by appellant included a September 20, 1985 employing establishment dispensary report which contained a diagnosis of questionable dislocated right thumb and questionable fracture of the fourth metacarpal and an emergency room report of the same date which included a diagnosis of crushing injury to the right fourth finger and hand. Appellant also submitted hospital records pertaining to his September 20, 1985 surgery in which Dr. Ahmed noted a crushing injury to the right fourth finger and hand and to his December 20, 1985 surgery for flexion contracture of the right fifth finger.

Reports of Dr. Hess dated November 12, 1985, February 18, 1986 and June 24, 1986 indicated that periodic electromyographic studies made following the employment injury revealed an injury to the branches of the right median and ulnar nerves to the thenar muscles, and that median nerve innervated muscles improved by June 24, 1986 although there was "persistent significant neuropraxia of the deep branch of the right ulnar nerve."

In a January 9, 1987 narrative report Dr. Ahmed summarized appellant's treatment and progress following the September 20, 1985 employment injury, diagnosed "carpometacarpal joint dislocation, traumatic flexion deformity, right fifth finger, proximal interphalangeal joint, traumatic" and opined that appellant "will probably be left with about 30 percent to 50 percent disability in regards to the hand."

In a January 12, 1987 narrative report Dr. Fleischman indicated he had reviewed a copy of appellant's medical records supplied by appellant's attorney, referred to his own examination of appellant on June 27, 1986 and stated:

> "On examination, [appellant] was noted to be suffering functional loss with respect to the right thumb and right small finger. He was also noted to be suffering considerable loss of grasp in his dominant right hand as compared with his nondominant left hand. There was noted atrophy of the thenar

> eminence, loss of strength at the right wrist, and restricted range of motion at the right wrist as compared with the left. There is sensory loss of the right hand noted as well.
>
> "In view of the factors stated herein, it is still my opinion that [appellant] is suffering a disability of 55 percent of the right thumb, 25 percent of the right small finger, and additional disability with respect to the right hand and wrist; the combination of which represents a disability of 35 percent of the right hand."

By decision dated August 4, 1987 and finalized August 13, 1987 the Office hearing representative found that the evidence of record established that appellant sustained a permanent impairment of the right little finger as well as the right thumb as a result of the September 20, 1985 employment injury and that he was therefore entitled to a schedule award for permanent impairment of the right hand under 5 U.S.C. section 8107(c)(17). The hearing representative remanded the case to the Office for a determination by an Office medical adviser of the percentage of permanent impairment appellant sustained to his right hand as a result of the September 20, 1985 employment injury to be calculated in accordance with the AMA *Guides*.

On September 16, 1987 Dr. J. Schneiderman, an Office medical consultant who is Board-certified in orthopedic surgery, reviewed Dr. Fleischman's June 30, 1986 report; commented that Dr. Fleischman had not described any loss of motion or instability of the right thumb (only scarring); and noted appellant's five degree flexion contracture of the PIP joint, his 35 degree loss of extension of the little finger, and his 30 degree loss of flexion at the DIP joint. Dr. Schneiderman opined that Dr. Fleischman's June 30, 1986 report did not support impairment of function of the right thumb and applied the A.M.A *Guides* to Dr. Fleischman's clinical findings to determine that appellant had a 40 percent permanent impairment of the little finger which was the equivalent of a three percent permanent impairment of the right hand.

The Office determined that Dr. Schneiderman improperly failed to consider appellant's previously accepted eight percent loss of use of the right thumb and referred the case record to Dr. Sidney Samis, an Office medical adviser who is Board-certified in preventive medicine, for a determination of the percentage of permanent impairment of the previously accepted right hand to include eight percent loss of use of the right thumb.

In a report dated October 13, 1987 Dr. Samis applied the A.M.A. *Guides* to Dr. Fleischman's June 30, 1986 clinical findings to determine that appellant had a 10 percent permanent impairment of the right hand. In arriving at his estimate of permanent impairment Dr. Samis indicated that a 35 percent loss of extension resulted in a 21 percent impairment of the little finger; that a five percent loss of flexion of the PIP joint resulted in a three percent impairment of the little finger; that a 30 percent loss of flexion of the DIP joint resulted in a 19 percent impairment of the little finger; that the total impairment of the little finger was 32 percent; that a 32 percent impairment of the little finger is the equivalent of a two percent impairment of the right hand; that an eight percent impairment of the right thumb is the equivalent of a three percent impairment of the right hand; that appellant's residual pain resulted in a three percent impairment of the right hand; that the five scars noted by Dr. Fleischman resulted in a two percent impairment of the right hand; and totalled appellant's permanent impairment of the right hand at 10 percent.

On October 16, 1987 the Office issued a schedule award for 10 percent permanent loss of use of the right hand to run for 24.4 weeks, from June 27, 1986 to December 14, 1986, and noted that appellant had already received payment for the period June 27, 1986 to August 7, 1986.

The Board finds that the case is not in posture for decision.

The schedule award provisions of the Federal Employees' Compensation Act set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of the members of the body listed in the schedule.[3] However, the Act does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the administering agency. However, as the Board has pointed out, for consistent results and to insure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office has adopted the American Medical Association's *Guides to the Evaluation of Permanent Impairment* in determining the extent of permanent impairments, and the Board has concurred with the adoption of these *Guides*.[4]

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[3] 5 U.S.C. section 8107.

[4] *John A. Marsch*, 33 ECAB 580 (1982).

In attempting to apply the standards of the A.M.A. *Guides* to the clinical findings reported by Dr. Fleischman the Office medical advisers did not accurately calculate the extent of impairment to appellant's right hand.

Dr. Beery, in his July 30, 1986 report finding an eight percent impairment of the right thumb, correctly applied Table 3 to determine that a five degree loss of extension of the carpometacarpal joint resulted in a three percent impairment of the thumb. However, Dr. Beery assigned a five percent impairment value to "weakness, thenar atrophy, pain and decreased sensation" without specifying the basis for such an assignment. The Board has found that Chapter 2 of the A.M.A. *Guides*, The Nervous System, provides a grading scheme and procedures for determining impairment of an affected body part due to pain, discomfort, or loss of sensation.[5] For this reason, it was error on the part of Dr. Beery to assign five percent impairment to appellant's subjective complaints without correlating such a percentage of impairment to the grading scheme of Chapter 2 of the *Guides*.[6]

Dr. Samis, in his October 13, 1987 report, assigned a 21 percent impairment value for 35 degree loss of extension of the little finger. It is unclear from the record how Dr. Samis arrived at this percentage. If it is Dr. Samis' position that a 35 degree loss of extension of the little finger is the same as a 35 degree loss of flexion-extension of the metacarpophalangeal joint of the little finger (and he if applied Table 7, page 8 of the *Guides* to arrive at the percentage of impairment) he should so state for the record. Dr. Samis correctly applied Table 6 (page 7) to determine that a five percent loss of flexion of the PIP joint resulted in a three percent impairment of the little finger and Table 5 (page 6) to determine that a 30 percent loss of flexion of the DIP joint resulted in a 19 percent impairment of the little finger. In totalling the percentage of impairment of appellant's little finger Dr. Samis misapplied the table of combined values to arrive at a 32 percent total impairment of the little finger rather than a 38 percent total impairment to the little finger. Hence, in applying Table 8 (page 8) to convert the total percentage of impairment of the little finger to a percentage of impairment of the right hand, Dr. Samis incorrectly stated that the impairment of appellant's little finger resulted in a two percent impairment to the right hand rather than a four percent impairment. Dr. Samis correctly applied Table 4 (page 4) to determine that an eight percent impairment of the thumb resulted in a three percent impairment of the hand. Dr. Samis assigned a three percent impairment value to appellant's pain and scars and a two percent impairment value to loss of strength. As explained above, Dr. Samis' assignment of impairment values due to pain and loss of strength, without correlating such values to the grading scheme of Chapter 2 of the A.M.A. *Guides*, was error. Dr. Samis also incorrectly valued the percentage of impairment resulting from appellant's scars. Chapter 11 of the *Guides*, The Skin, provides that where scarring results in permanent impairment the specific nature of the impairment must be identified and the criteria of the appropriate chapter of the *Guides* applied. For instance, where scarring results in behavorial changes the criteria in Chapter 12 should be applied; where scarring results in loss of function due to sensory deficit, pain or discomfort, the criteria in Chapter 2 should be applied; and where scarring results in loss of function due to limited motion, the criteria in Chapter 1 should be applied.[7]

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[5] *See Richard W. Robinson*, 39 ECAB 484 (1988).

[6] *Id.*

The case will be remanded to the Office for referral to an Office medical adviser for a determination of the percentage of permanent impairment of appellant's right hand in accordance with this decision.[8] After any further development of the record it deems necessary, the Office shall issue a *de novo* decision.

The October 16, 1987 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for recalculating of appellant's schedule award to be followed by a *de novo* decision.

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[7] A.M.A. *Guides*, Chapter 11, page 204.

[8] The Board notes that the estimates of permanent impairment provided by appellant's physicians, Drs. Ahmed and Fleischman, are of diminished probative value as neither physician provided an explanation of how he arrived at his percentage of impairment and neither physician indicated that his estimate was based upon the A.M.A. *Guides*. *See Quincy Malone*, 31 ECAB 846 (1980) and *Thomas P. Gauthier*, 34 ECAB 1060 (1983).

In the Matter of JOHN W. BUTLER *and* DEPARTMENT OF THE ARMY, U.S. ARMY MISSILE COMMAND, Redstone Arsenal, Ala.

Docket No. 88-290; Submitted on the Record;
Issued May 13, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant's hearing loss is causally related to factors of his federal employment.

On May 6, 1985 appellant, then a 53-year-old electronics technician, filed a claim alleging a hearing loss caused by exposure to hazardous noise levels in the course of his federal employment. Appellant stated that he first became aware of his hearing loss on March 19, 1981 after seeing a physician at the recommendation of "Occupational Health." He stated that he did not immediately file his claim because "Occupational Health did not inform me that I needed to file a claim." The employing establishment indicated on the reverse of appellant's claim that appellant was still working and still exposed to the conditions alleged to have caused his hearing loss.

The Office of Workers' Compensation Programs obtained appellant's personnel and medical records from the employing establishment which indicated that appellant was in the Army from 1953 to 1959 where he was exposed to gunfire in target practice; that he had been employed with the federal government since 1960, and that he had been with the employing establishment in his present civilian position since June 7, 1964. Appellant claimed that he had worked in a noise environment since 1968. Decibel levels in areas where appellant worked were in excess of 85 decibels. The employing establishment indicated that ear defenders were first issued in 1977 but that certain aspects of appellant's job precluded appellant's use of ear defenders in certain hazardous noise situations. Also included in the information received by the Office were annual employing establishment audiograms from 1963 to 1985.

In support of his claim, appellant submitted the April 15, 1985 report of Dr. Eugene L. Tate, a Board-certified otolaryngologist, accompanied by a February 19, 1985 audiological report that was reviewed by Dr. Tate. In his report Dr. Tate noted appellant's history of working in a noisy environment since 1968, that appellant had noticed a hearing loss in 1981, that appellant had experienced some tinnitus at night, that appellant had worn ear plugs and head sets for the previous ten years, and that appellant had no history of a head injury. Dr. Tate did not discuss the contents of the attached audiogram, but he did remark that the reliability of the test was "poor." Dr. Tate's opinion on causal relation was as follows: "I feel that there is no relationship between the patient's employment-related noise [exposure] and his hearing loss. He has a sensorineural hearing loss that is probably congenital in nature." Dr. Tate recommended that appellant continue to wear ear protection when exposed to loud noises.

By letter dated June 17, 1985, the Office referred appellant to Dr. Tate for otologic examination and audiological evaluation. The Office provided Dr. Tate with a statement of accepted facts and the medical evidence of record.

Dr. Tate performed an otologic evaluation of appellant on September 10, 1985 and audiometric testing was conducted on the doctor's behalf on June 24, 1985. In his report Dr. Tate noted that appellant's "first audiogram was apparently made on October 31, 1963 and at that time [appellant] had a significant hearing loss in all frequencies [with a loss of] 40 decibels at 6,000 cycles in the right ear and 30 decibels at 4,000 cycles in the left ear. This was at the age of 31 . . . with a history of only mild exposure to noise while in the military service." Dr. Tate then found that appellant's hearing loss was not work related and stated the following as his rationale:

> "It is important that there was a significant hearing loss affecting both ears at the time of the first audiometric examination in 1963 at the age of 31 years. It is my opinion that this indicated at that early date that this man would have a progressive sensorineural deafness with moderate to severe deafness in his old age. I also believe that the reliability of his most recent audiograms is low because of the fact that there is no change in his speech reception threshold since he was tested in 1981 but there is a significant change 'worsening' in the pure tone audiogram. In the past history obtained in June, 1985, it was determined that his 81-year-old father has significant hearing loss. My opinion is that he has a congenital determined hearing loss and it is my opinion that the pure tone audiogram does not accurately represent his actual hearing at this time."

On September 19, 1985 the Office medical adviser reviewed Dr. Tate's report and agreed with his conclusion.

By compensation order dated October 21, 1985 the Office rejected appellant's claim on the grounds that appellant's loss of hearing was not causally related to factors of his federal employment. In an accompanying memorandum it was noted that Dr. Tate had negated causal relation after noting that appellant had a significant hearing loss in 1963 at age 31 and that appellant's family had a history of hearing loss.

After appellant requested a hearing on November 19, 1985 the Office, by letter dated January 7, 1986, informed appellant that upon review of the case it was found that additional development was needed on the issue of causal relation. An internal Office memorandum from the hearing representative stated that the evidence used to deny the case was insufficient to discharge the Office's burden of proof in that Dr. Tate did not state what evidence was considered in determining that appellant's hearing loss was congenital.

By letter dated March 4, 1986 the Office informed appellant that he would need to be reexamined. Another March 4, 1986 letter was sent to Dr. Tate from the Office medical adviser. The Office medical adviser requested that Dr. Tate have the audiometric testing repeated and that Dr. Tate address the issue of whether any part of appellant's hearing loss could in medical probability be due to noise encountered in appellant's federal employment. The Office medical adviser concluded his letter to Dr. Tate by commenting on a statement made by the hearing examiner in the January 7, 1986 Office memorandum: "I do have difficulty with his statement: 'Unless the evidence can show this loss was not due to the claimant's noise exposure, it is compensable.' I question whether this was really meant since it does not appear consistent with what I have been taught of Workers' Compensation."

Dr. Tate performed an otologic evaluation of appellant on August 5, 1986 and audiometric testing was conducted on the doctor's behalf on May 6, 1986. Dr. Tate's report reiterated much of the same information as contained in his September 10, 1985 report. He noted appellant's "sizeable" hearing loss in 1963 and stated that he believed that appellant's hearing loss was inherited because appellant's father had a significant hearing loss. Dr. Tate diagnosed sensorineural deafness that was inherited and not due to employment-related noise exposure. Dr. Tate stated his rationale as follows:

> "1. This man's father had hearing loss without a history of excessive noise exposure.
>
> "2. The patient had a large hearing loss (sensorineural) at age 31 which has been progressive to the present time.
>
> "3. Adequate ear protection was issued in 1977 and at least on two other occasions later.
>
> "4. The patient's hearing loss became accelerated after he was issued ear protective apparatus and at an interval of time when his hearing noise exposure was at a level not expected to produce hearing loss."

In an August 13, 1986 memorandum, the Office medical adviser reviewed Dr. Tate's report and found improved conformity between SRT and PTA scores in the latest audiogram and generally agreed with Dr. Tate's report. The Office medical adviser then noted the hearing representative's statement in the January 7, 1986 Office memorandum on the type of evidence that was needed to deny compensation. After quoting this statement the Office medical adviser stated: "From the standpoint of the layman outside of the OWCP legal or administrative staff this has the appearance of the adoption of the Napoleonic Code and thus the workplace is guilty of doing damage to the worker unless it can prove itself innocent." The Office medical adviser then noted the plethora of possible causes for hearing loss, many of which arise from the advent of modern technology. The Office medical adviser described possible causes of sensorineural hearing loss, the variance in degrees of hearing loss among different people from non work-related etiologies, and how Dr. Tate's report was based on the history given by the patient and concluded that Dr. Tate had arrived at a probable etiology that is not uncommon (hearing loss based on hereditary factors). The Office medical adviser then stated that "we do not have unquestionable documentable proof" and stated his view that "[a]djudication appears to depend on whether the requirements of the system are to demonstrate a scientific probability of causality or an absolute requirement to prove that causality could not have been possible." The Office medical adviser concluded by diagnosing: "Sensorineural Hearing Loss not demonstrated by scientific probability to be due to noise exposure in the Federal civilian workplace."

The Office medical adviser, by letter dated August 18, 1986, sent Dr. Tate a copy of his August 13, 1986 memorandum with a cover letter in which he stated to Dr. Tate the particular points that he found important and how he was able to take the "excellent material" provided by Dr. Tate to "assemble the supportive rationale" in support of each point. Included in the cover letter to Dr. Tate was the following:

> "Although the hearing representative has taken the position that if it cannot be proved that noxious noise in his Federal civilian workplace did not cause the damage it is compensable, I believe this is somewhat against the basic American principle of assuming innocence until guilt can at least be reasonably established. It would seem more consistent with basic principles to try and determine the probability of the causality within the information we have and our knowledge of the natural history of how noise damages the cochlea. In our system when dealing with matters that cannot be determined with absolute certainty the probabilities may be addressed but only have truly probative value when accompanied by well-developed and often extensive medical rationale."

By letter dated August 29, 1986 Dr. Tate responded to the Office medical adviser's August 18, 1986 letter and stated, in part:

> "I feel that you have done a very good job summarizing our findings and opinion. There is no doubt in my mind that [appellant's] hearing loss is not due to his government employment. I feel it would be very clear to anyone who would examine his entire record that this is true."

By compensation order dated August 29, 1986, the Office rejected appellant's claim on the grounds that appellant's hearing loss was not causally related to factors of his federal employment. An accompanying memorandum made reference to the memorandum accompanying the October 21, 1985 compensation order and also noted Dr. Tate's report of August 5, 1986 and the Office medical adviser's opinion.

By letter dated November 12, 1986 appellant requested reconsideration. In his letter appellant based his request upon his belief that he should have been referred to a doctor other than Dr. Tate since Dr. Tate had previously examined him, and he also contended that his father did not start having hearing problems until 1979 when he was age 76. No other evidence was submitted.

By compensation order dated January 26, 1987 the Office denied modification of its prior order after reviewing the case on the merits, finding that the evidence submitted was insufficient to warrant modification. An accompanying memorandum noted that the factual evidence submitted by appellant did not show that his "disability" was causally related to factors of his federal employment.

By letter dated September 4, 1987 appellant requested reconsideration. Appellant contended that he had no hearing loss upon entering federal service and that annual audiograms did not show any hearing problems until 1981. Appellant also contended that his father's hearing loss was due to working in a "noisy cotton mill for over 20 years." Accompanying appellant's request was a May 12, 1987 employing establishment noise survey, a previously submitted statement from appellant's supervisor, and an August 19, 1987 report from Dr. William J. Freeman, a Board-certified otolaryngologist.

In his report Dr. Freeman noted appellant's history of noise exposure at work since 1963 and opined that appellant's annual audiograms showed a progressive high frequency loss in both ears. Dr. Freeman's report then stated, in relevant part:

> "An audiogram was performed at our office on 6-23-87 and revealed 50 dB SRT bilaterally, and a high frequency hearing loss of 50 to 60 dB at 4,000 cycles and 70 dB at 8,000 cycles. His hearing in the human speech range of 500 to 2,000 cycles was at the 30 dB range [and] therefore is satisfactory serviceable hearing for human speech without amplification (hearing aid). His speech discrimination scores at the time of our audiogram revealed 100 percent discrimination at 65 dB bilaterally."
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> * * *
>
> "The patient's brother . . . has also been exposed to significant noise at work, and his audiogram done at our office revealed also a high frequency hearing loss bilaterally, in the range of 70 dB at 4,000 cycles and he does not show a significant hearing loss in the human speech frequency range of 500 to 2,000 cycles in that he could hear [at the] 30 dB level in those frequencies. His age is 50 years.
>
> "The patient's brother, Albert . . . had an audiogram performed at our office on 7-29-87 and this revealed hearing at [the] 20 dB level from 500 to 2,000 cycles, and then had 30 dB at 4,000 cycles, and then 80 dB at 8,000 cycles. This man denied any significant history of noise exposure. His age is 61 years.
>
> "My conclusion is that John Butler's high frequency hearing loss is most likely due to his noise exposure and not premature

> presbycusis. However, this high frequency hearing loss to this date should not handicap the patient for normal human conversation. The possibility exists, in my opinion, that with continued noise exposure, he could eventually develop hearing loss of greater than 40 dB in the frequency of 2,000 cycles, which then would affect his being able to hear some normal human conversation."

The audiograms that Dr. Freeman stated had been performed at his office did not accompany his report.

By compensation order dated October 21, 1987, the Office denied appellant's application for review, finding that appellant's application was *prima facie* insufficient to warrant review under 5 U.S.C. section 8128 of the Federal Employees' Compensation Act. An accompanying memorandum found that the evidence submitted by appellant was cumulative, repetitious and irrelevant. The memorandum noted that Dr. Freeman's report lacked a complete and accurate history and also lacked rationale to support his "speculative opinion."

The Board finds the case is not in posture for decision.

Appellant has the burden of proving by the preponderance of the reliable, probative, and substantial evidence that he is disabled for work as a result of an employment injury. This burden includes the necessity of submitting medical opinion evidence, based on proper factual and medical background, establishing such disability and its relationship to his employment. Neither the fact that the condition became apparent during a period of employment, nor the belief of the employee that the condition was caused, precipitated, or aggravated by factors of his employment is sufficient to establish causal relationship.[1]

The Board notes that in the instant case, appellant originally supported his claim for an employment-related hearing loss by submitting medical evidence from Dr. Tate. The reports of Dr. Tate, however, indicated that appellant's hearing loss was congenital in nature and not due to occupational noise exposure. The Office rejected appellant's claim but the case was reopened following review by an Office hearing representative who noted that the evidence of record was "insufficient" to discharge the Office's burden of proof. The Board notes that the initial burden is on the employee to support his or her claim for compensation by providing competent medical opinion evidence in support of the claim. In the present case, the Office hearing representative did not articulate his reasoning for imposing the burden of proof on the Office. This error on his part was noted and commented upon by the Office medical adviser.

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[1] *James L. Hays*, 36 ECAB 128 (1984).

Proceedings under the Federal Employees' Compensation Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[2] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[3] It is improper for the Office to allow the Office medical adviser to interject his views on legal issues.

The role of the Office medical adviser is to act as a consultant in reviewing cases under the Act. Determination of legal standards in regard to medical questions presented by a case are outside the scope of expertise of the medical adviser or any other physician involved in a case.[4] FECA Bulletin 84-33 states that the Office medical adviser's opinion should not "explicitly address legal or adjudicating issues" when providing an opinion to the Office claims examiner, as questions relating to the acceptance or weight of medical evidence is in the province of the claims examiner and not the Office medical adviser.[5] FECA Bulletin 84-33 also states that claims examiners "should insure that letters requesting opinions or clarifications of opinion from independent or attending physicians are objective and make no references to the claimants entitlement to various benefits. . . . Examiners should also insure that the medical evidence they use for adjudication is devoid of reference to the claimant's legal rights, factual situation, etc." [6]

The Office medical adviser allowed his disagreement with the hearing representative to taint the medical evidence. The Office medical adviser shared these nonmedical views with Dr. Tate before and after Dr. Tate's August 5, 1986 examination of appellant and the Office medical adviser allowed these views to be included in his professional evaluation of whether appellant's hearing loss was causally related to factors of his federal employment. By coloring the record with his view of legal standards, the Office medical adviser exceeded the scope of his expertise. On remand the Office should prepare a detailed and accurate statement of accepted facts and refer appellant, together with the case record, to a Board-certified otolaryngologist for otologic evaluation and audiometric testing as well as a rationalized medical opinion on whether appellant's hearing loss is causally related to factors of his federal employment. The specific Office medical adviser in this case should not participate in this case upon remand. Following such further development as the Office may deem necessary, a *de novo* decision should be issued.

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[2] *Russell F. Polhemus*, 32, ECAB 1066 (1981).

[3] *See Robert F. Hart*, 36 ECAB 186 (1984); *Isidore J. Gennino*, 35 ECAB 442 (1983).

[4] *See Richard A. Sroka*, 35 ECAB 209 (1983).

[5] FECA Bulletin No. 84-33 (issued July 6, 1984); *see also Joseph W. Baxter*, 36 ECAB 228 (1984).

[6] FECA Bulletin 84-33, *supra*.

The January 26, 1987 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

In the Matter of JAMES E. JENKINS *and* DEPARTMENT OF HEALTH & HUMAN SERVICES, HEALTH RESOURCES AND SERVICES ADMINISTRATION, Rockville, Md.

Docket No. 87-1588; Hearing April 14, 1988;
Issued May 16, 1988

Appearances: *Ronald G. Kronthal, Esq.*, for appellant; *Paula A. Lincoln, Esq.*, for the Director, Office of Workers' Compensation Programs

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing that he sustained a permanent partial impairment to a schedule member of his body causally related to a July 24, 1985 employment injury thereby entitling him to a schedule award.

On July 24, 1985, appellant, then a 56-year-old management analyst, filed a claim for traumatic injury alleging that he sustained an abrasion of his left knee, swelling of his left hand and soreness of his neck and left shoulder when he slipped and fell at the employing establishment.

Appellant was examined that day by Dr. Norman H. Rubenstein, a Board-certified internist, who diagnosed appellant's condition as "hematoma of [left knee] area, hypesthesia of left second finger" and stated that an x-ray examination of appellant showed "pain along course of radial nerve." Appellant was subsequently referred to Dr. Harvey N. Mininberg, a Board-certified orthopedic surgeon, for examination and treatment.

In a report dated August 9, 1985, Dr. Mininberg reported his findings upon physical and x-ray examination of appellant as follows:

> "*PHYSICAL EXAMINATION*: Tenderness to the cervical spine and tenderness and spasm to the paracervical muscles and full mobility to the cervical spine including flexion and extension, left and right side bending and left and right rotation. All are complete with discomfort at the extremes of motion. No supraclavicular tenderness or masses. Full range of glenohumeral motion bilaterally with some discomfort in the paracervical regions. No point tenderness to the proximal bicipital groove, rotator cuff or AC [acromioclavicular] joint. Tenderness to the thoracic spine and spasm and tenderness to the paravertebral muscles and pain on side bending.
>
> "Tenderness to the left wrist and hand and pain with full mobility, particularly pronation and supination. No tenderness to the first dorsal compartment or to the anatomic snuffbox. Finkelstein's test is negative.
>
> "X-RAY: CERVICAL SPINE: No evidence of fx [fracture] or dislocation. No evidence of retropharyngeal swelling. Lipping and spurring.
>
> "THORACIC SPINE: No fx or dislocation.
>
> "LEFT SHOULDER: No fx or dislocation.
>
> "RIGHT SHOULDER: No fx or dislocation.
>
> "LEFT WRIST: No fx or dislocation.
>
> "LEFT HAND: No fx or dislocation."

Dr. Mininberg diagnosed appellant's condition as "cervical and thoracic spine strain; contusion left wrist" and recommended as treatment "cervical collar and pillow and wrist splint immobilizer and physical therapy" and further recommended that appellant be reevaluated in one week.

Included with Dr. Mininberg's report of August 9, 1985 were his treatment notes pertaining to his biweekly examination of appellant during the period September 9, 1985 to December 11, 1985. Dr. Mininberg noted at each examination that "spasm and tenderness persisted in the paraspinal muscles" and appellant continued to "have discomfort in the cervical spine."

The Office of Workers' Compensation Programs accepted appellant's claim for "hematoma to the left knee, contusion to the

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second left finger and cervical sprain." Appellant was authorized continuation of pay for work missed on an intermittent basis during the period July 26, 1985 to November 6, 1985.

Appellant continued to furnish the Office with Dr. Mininberg's treatment notes on his biweekly examinations. In the treatment notes for the period January 6, 1986 to February 28, 1986, Dr. Mininberg reported on January 6, 1986 as follows:

> "[Appellant] continues to have significant discomfort in the cervical spine. Pain with damp weather changes as well as overactivities. Pain with lifting, bending, stooping. Tenderness to the paraspinal muscles. Full mobility. Some discomfort at the extremes of motion. In view of the above, the patient is entitled to ten percent whole body permanent physical impairment and loss of physical function."

Appellant subsequently submitted the March 20, 1986 attending physician's report of Dr. Mininberg who repeated his diagnosis of appellant's condition provided in previous reports and noted that appellant was totally disabled for work from July 24, 1985 to August 1985 and partially disabled for work from August 1985 to October 29, 1985. Dr. Mininberg stated that appellant could resume work on a light-duty basis provided the work did not involve any heavy lifting. Appellant also submitted Dr. Mininberg's treatment notes for the period January 24, 1985 to May 7, 1986.

On March 31, 1986, appellant filed a claim for a schedule award.

Appellant subsequently submitted the June 5, 1986 report of Dr. Inder Chawla, Board-certified in physical medicine and rehabilitation, who performed an electromyogram and nerve conduction studies on appellant on June 5, 1986. Dr. Chawla reported his findings as follows:

> "IMPRESSION: The findings are consistent with the following process:
>
> "SENSORY CARPAL TUNNEL SYNDROME ACROSS THE LEFT WRIST.
>
> "The sensory latency for the left median nerve is prolonged to 4.80 milliseconds which is below lab route. The motor latency and nerve conduction values are normal. The nerve conduction values across the right wrist are unremarkable. Minimal denervation was seen in the left shoulder pollicis brevis muscle.

> "MILD TO MODERATE C4-5 ROOT IRRITATION AFFECTING THE LEFT UPPER EXTREMITY.
>
> "Needle EMG [electromyogram] also revealed fibrillation positive sharpewaves, high frequency discharges and excessive polyphasic motor units in the sternoclavicular mastoid supraspinous, deltoids, biceps and brachioradialis muscles. On volitional contraction there was presence of triphasic/polyphasic motor units and a disorderly recruitment.
>
> "From an electrophysiological perspective, the above findings are compatible with a combination of sensory CTS [carpal tunnel syndrome] at the wrist and C4-5 root irritation of the cervical spine level."

On July 21, 1986, the Office referred appellant's case file, together with a statement of accepted facts and list of specific questions, to an Office medical adviser for review and evaluation. The Office requested the Office medical adviser to provide his opinion on, *inter alia*, whether appellant's continuing treatment and complaints were a result of his July 24, 1985 injury and to provide a diagnosis of appellant's work-related condition. The Office medical adviser, in a response dated July 23, 1986, stated that he believed appellant's continuing treatment and complaints were a result of his July 23, 1985 injury and gave a diagnosis of cervical strain.

On August 7, 1986, the Office requested appellant to indicate for which part of the body he was claiming a schedule award. The Office informed appellant that schedule awards may be paid only for permanent impairment to body and organs listed in the schedule award provisions of the Federal Employees' Compensation Act [1] and that the back is not listed in the schedule award provisions of the Act.[2] The Office further informed appellant that any percentage estimate of impairment must be based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. The Office requested that appellant submit the necessary evidence within 30 days or the Office would render a decision based on the evidence of record.

Appellant subsequently submitted Dr. Mininberg's treatment notes for the period May 28, 1986 to September 26, 1986. In his entry for July 9, 1986, Dr. Mininberg stated in relevant part:

> "Patient continues to have significant discomfort in the cervical spine. There is tenderness to the paraspinal muscles with

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[1] 5 U.S.C. section 8101 *et seq.*

[2] 5 U.S.C. section 8107

> discomfort at the extremes of motion. In addition, the patient has pain with damp weather changes, with fatigue type pain with normal activities and discomfort with heavy activities. His EMG examination was positive for a C4, C5 root irritation involving the left upper extremity. In view of the above with references to the cervical spine, the patient is entitled to 15 percent whole body permanent physical impairment and loss of physical function."

Appellant also submitted the September 11, 1986 report of Dr. Chawla who reported his findings, following recent electromyogram and nerve conduction studies performed on appellant, as follows:

> "*IMPRESSION*: The findings are consistent with the following process:
>
> "MILD C6 ROOT IRRITATION AFFECTING THE RIGHT UPPER EXTREMITIES AND CERVICAL PARASPINALS.
>
> "Motor and sensory latency, amplitude, duration, waveform and the nerve conduction values for the median and radial nerves are normal. The F responses are also normal.
>
> "Needle EMG was abnormal in the form of occasional denervation activity in C6 root innervated muscles namely pronator teres, deltoids, biceps and brachioradialis. The volitional activity was nearly full.
>
> "From an electrophysiological perspective, the above findings are of mild severity affecting the right upper extremity."

By compensation order dated October 27, 1986, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim for a schedule award on the basis that the back is not a schedule award member as described in 5 U.S.C. section 8107.

Subsequent to issuance of the Office's decision of October 27, 1986, appellant submitted Dr. Mininberg's treatment notes for the period August 29, 1986 to October 17, 1986.

By letter dated November 17, 1986, appellant through his attorney, requested a hearing before an Office hearing representative and the Office scheduled a hearing for February 24, 1987.

Prior to the hearing, appellant submitted Dr. Mininberg's treatment notes for November 7, 1986 and an addendum to his July 9, 1986 notes. In the addendum, Dr. Mininberg stated:

> "In view of the above with reference to the cervical spine . . . should read: In view of the above with reference to the cervical spine and the left upper extremity, the patient is entitled to 15

> percent whole body permanent physical impairment and loss of physical function."

At the hearing held on February 24, 1987, appellant testified that his employment injury severely affected his left arm. Appellant's attorney alleged that although appellant initially injured his back on July 24, 1985, the injury affected his left arm and appellant was therefore claiming compensation for impairment of his left arm which is a scheduled member of the body. The Office hearing representative agreed to leave the record open for an additional 30 days to allow appellant an opportunity to submit additional medical evidence.

Subsequent to the hearing, appellant submitted the April 16, 1987 report of Dr. Andrew L. Tievsky, a Board-certified radiologist, who reported his findings on magnetic resonance imaging study of appellant's cervical spine. This report stated as follows:

> "PROCEDURE: Sagittal T1 and T2 weighted pulse sequences were performed utilizing the neck coil with 4 mm slice thickness. Multi echo technique was employed for variable T2 weighting.
>
> "FINDINGS: Minimal decreased signal was noted within all cervical intervertebral discs indicating early degeneration. Minimal ventral impressions on the thecal sac are noted at C5–6 and C6–7 related to degenerative spurring. There is no evidence of disc herniation or central canal stenosis. Foraminal stenosis is noted bilaterally at C5–6 and C6–7 related to degenerative spur formation. Spinal cord had normal morphology and signal characteristics.
>
> "IMPRESSION: Forminal stenosis C5–6 and C6–7 secondary to degenerative spurring.
>
> "No evidence of HNP [herniated nucleus pulposus] or stenosis."

In a decision dated May 6, 1987 and finalized on May 7, 1987 the Office hearing representative affirmed the October 27, 1986 decision of the Office finding that appellant is not entitled to a schedule award on account of his July 24, 1985 employment injury. The Office hearing representative noted that appellant's physician, Dr. Mininberg, had only diagnosed cervical and thoracic strains and a contusion of the left wrist and that strains and contusions are essentially soft tissues injuries which do not usually result in permanent residuals or impairment. The Office hearing representative further noted that a schedule award of compensation on account of an exclusively cervical condition is statutorily barred as the cervical spine is a part of the back which is not a member of the body listed in the schedule award provisions of the Act and that Dr. Mininberg had not identified any medical condition of an extremity or of the back, and explained its relationship to the injury, from which a permanent partial disability would be expected to arise nor did Dr. Mininberg explain how appellant's contusion and/or strains may have caused some permanent partial disability. The hearing representative concluded that appellant failed to discharge his burden of proof.

On appeal, appellant through his attorney, contends that appellant's employment injury to his neck affected his left arm and that "[Dr. Mininberg's] reference to the 15 percent to the body as a whole can certainly be understood to be 15 percent to the arm because it was that area of the body which was affected by the injury. The hearing examiner is not limited solely to the report of the physician in making a determination; there is no reason why, using an appropriate amount of discretion, that [the Office hearing representative] could not have found this to be the case."

The Board finds that appellant has not met his burden of proof in establishing that he sustained a permanent partial impairment to a schedule member of his body causally related to a July 24, 1985 employment injury, thereby entitling him to a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act provide for payment of compensation to employees sustaining permanent impairment from loss, or loss of use, of specified members of the body and set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of the members of the body listed in the schedule.[3] A schedule award is not payable for the loss, or loss of use, of a part of the body not specifically enumerated in the Act.[4] Neither the Act nor its regulations [5] provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.[6]

Appellant's physician, Dr. Mininberg, a Board-certified orthopedic surgeon, examined appellant on July 6, 1986 and stated that as a result of the cervical sprain sustained by appellant in his July 24,

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[3] 5 U.S.C. section 8107.

[4] *Ernest P. Govednik*, 27 ECAB 77 (1975).

[5] 20 C.F.R. section 10.304.

[6] 5 U.S.C. section 8101(20).

1985 employment injury, appellant had a 15 percent whole body permanent physical impairment and loss of physical function. In response to his report, the Office of Workers' Compensation Programs informed appellant that neither the Act nor its regulation provide for schedule awards for impairment to the back or to the body as a whole. At the hearing held before an Office hearing representative, appellant alleged that his injury to his cervical spine resulted in impairment to his upper left extremity. The Office hearing representative acknowledged the possibility that an injury to the back, not a schedule member of the body, may affect an arm or leg, schedule members of the body, thereby entitling a claimant to a schedule award but that in appellant's case there was no medical evidence of record upon which such a determination could be made.

The Board finds that the medical evidence of record does not provide a description of appellant's impairment to his upper left extremity and, without such description, the extent of appellant's impairment to this member of his body, if any, and his entitlement to a schedule award cannot be properly determined. A description of appellant's cervical condition and acceptance of Dr. Mininberg's assignment of a 15 percent whole body impairment as representing a 15 percent impairment of the upper left extremity, as appellant suggests on appeal, is not the method by which an impairment rating for a schedule member is determined by the Office.

The Federal Employees' Compensation Act does not specify the manner in which the percentage loss of a schedule member shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office. For consistent results and to insure justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association's *Guides to the Evaluation of Permanent Impairment*[7] has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.[8]

The Federal (FECA) Procedure Manual provides guidance for obtaining medical evidence from physicians required for a schedule award as follows:

> "The evaluation should be made by the attending physician. In all cases this must include a detailed description of the impair-

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[7] A.M.A. *Guides* (2nd ed. 1984).

[8] *See Quincy E. Malone*, 31 ECAB 846 (1980); *Ronald J. Pavlik*, 33 ECAB 1596 (1982).

> ment, including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbances of sensation, or other pertinent description of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. Additional reports should be required of the physician where the report does not meet this test."
>
> * * *
>
> "The report should include an estimate in percentage terms of the physical impairment. Where this information is missing, the claims examiner may ask the Office medical adviser to supply this estimate. The first of these two alternatives is the preferred course and should be used whenever practical." [9]

The Federal Procedure Manual further provides that the impairment must be correctly described and the percentage evaluation must be reasonable for the amount of impairment described. An Office claims examiner should not refer the case to the Office medical adviser for computation of a percentage of impairment unless a physician's report of examination which includes necessary measurements of active and passive motion is in the case file.[10] However, in cases where a physician's report is complete, except for the computation of the percentage of impairment, the Office medical adviser may be asked to provide this information.[11]

In the instant case, appellant failed to provide a physician's report which contained a complete and detailed description of the nature and extent of appellant's impairment of his upper left extremity such that, utilizing the AMA *Guides*, an impairment rating could be determined by the Office. Accordingly, the Office properly denied appellant's claim for a schedule award.

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[9] Federal (FECA) Procedure Manual, Chapter 2-808, Development of Permanent/Schedule Disability Claims, paragraph 7(c) (September 1980).

[10] With respect to the permanent impairment of the extremities, the AMA standards are based primarily on loss of motion. All factors which prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent loss of use for schedule award purposes. In determining the extent of loss of motion, the specific functional impairments (such as loss of flexion and extension) should be itemized and stated in terms of a percentage loss of use of the member in accordance with the AMA *Guides* tables. *See* AMA *Guides* (2nd ed. 1984) Chapter 1.

[11] Federal (FECA) Procedure Manual, Chapter 2-808, Development of Permanent/Schedule Disability Claims, paragraph 7(c)(3) (December 1983). *See also* the preface to the AMA *Guides* which notes that the guidelines were prepared to allow one physician to use the clinical data of another physician in order to arrive at a uniform standardized evaluation. AMA *Guides* (2nd ed. 1984) at p. viii.

The decision of the Office of Workers' Compensation Programs dated May 7, 1987 is hereby affirmed.

In the Matter of JAMES R. ROWELL *and* DEPARTMENT OF HEALTH & HUMAN SERVICES, FOOD AND DRUG ADMINISTRATION, Rockville, Md.

Docket No. 87-706; Hearing April 19, 1988;
Issued May 17, 1988

Appearances: *James R. Rowell, pro se; Catherine P. Carter, Esq.,* for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant was without fault with respect to an overpayment in the amount of $1,837.80 which arose because appellant received compensation for temporary total disability and worked four hours per day from January 6 to February 14, 1986; and (2) whether appellant is entitled to further compensation for the period from April 24 to June 21, 1985.

On February 14, 1983 appellant, then a 33-year-old management analyst, filed a claim for a lower back injury sustained on that date when he slipped and fell on ice. Appellant stopped work on February 15, 1983 and returned about the end of February 1983.[1] His condition was diagnosed as an acute lumbar strain.

On May 4, 1985 appellant filed a claim for a recurrence of disability causally related to his February 14, 1983 injury. On this claim form the date appellant stopped work following his recurrence of disability was listed as May 2, 1985, but appellant later filed a claim for compensation for the period beginning April 24, 1985. Appellant used annual leave for April 24, 25, and 26, 1985, used sick leave on April 29, 1985, worked eight hours on April 30 and six hours on May 1, 1985, used two hours sick leave on May 1, 1985, and thereafter used sick leave including advanced sick leave through June 20, 1985. On June 21, 1985 appellant used 7.5 hours of annual leave and one-half hour of sick leave; after this date the employing establishment placed appellant in a leave-without-pay status.

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[1] The exact date of his return to work is not shown by the case record.

The Office of Workers' Compensation Programs accepted that appellant's recurrence of disability beginning April 24, 1985 was causally related to his February 14, 1983 employment injury, and authorized surgery for a herniated nucleus pulposus found on myelography and CT (computed tomography) scan on May 6, 1985. The Office paid appellant compensation for the period beginning June 23, 1985.

In letters dated August 28, 1985 the Office advised appellant that if he was unable to perform the duties of the job he held when injured but was able to perform other work he would be paid compensation based on the difference between his monthly pay and his wage-earning capacity as determined by the Office or by his actual earnings, that he must notify the Office immediately if he returned to work, and that he should return any compensation checks received after he returned to work.

Appellant returned to work on January 6, 1986 for four hours per day; on February 14, 1986 he returned to his regular, full-time employment.

On March 13, 1986 the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount of $1,837.80 which arose because he received compensation for temporary total disability and worked four hours per day during the period from January 6, 1986 to February 14, 1986. The Office also preliminarily determined that appellant was at fault on the basis that he should have known that he was not entitled to compensation for total disability during periods he worked.

By a March 13, 1986 letter the Office advised appellant that he was entitled to compensation in the gross amount of $5,268.36 for the period from April 24, 1985 to June 21, 1985, and that he could receive this compensation if he entered a leave-without-pay status or bought back the leave he had used by refunding to the employing establishment the entire amount of leave pay received and having his leave record changed from paid leave to leave without pay.

Appellant requested a hearing, and stated that he disputed the "total amount owed" and the finding of fault. At a prehearing conference on September 29, 1986 appellant contended that he was entitled to compensation for the period from April 24, 1985 to June 21, 1985 on the basis that he was in a leave-without-pay status during this period and that the Office of Personnel Management had deducted the amount he had received as advanced leave during this period from his accrued retirement benefits. Appellant agreed to have the overpayment in the amount of $1,837.80 deducted from the amount owed to him by the Office for the period from April 24, 1985 to June 21, 1985. Appellant submitted a copy of a March 21, 1986 application for reinstatement of leave in which he indicated he had refunded or made arrangements to refund all leave pay received for the period from April 24, 1985 to June 21, 1985, and a copy of employing establishment records showing that the 322 hours of paid leave he used from April 24, 1985 to June 21, 1985 had been converted to 330 hours of leave without pay.[2] Also submitted was an Office of Personnel Management document dated August 18, 1986 and titled "Request for recovery of debt due the United States," which showed that $3,185.52 had been set off against appellant's Civil Service Retirement fund to recover 156 hours of advanced sick leave. This form showed appellant resigned from the employing establishment effective July 19, 1986.

On October 30, 1986 an Office hearing representative called the employing establishment's payroll office, and was advised that appellant had been placed in a leave-without-pay status for the period from April 24, 1985 to June 21, 1985 based on his March 21, 1986 form agreeing to repurchase leave used during this period, but that the only money the employing establishment had received was from the Office of Personnel Management for the 156 hours of advanced sick leave.

By a decision dated December 10, 1986 an Office hearing representative found that appellant was entitled to compensation in the amount of $2,389.14 for the 156 hours of sick leave deducted from his accrued retirement benefits, but that he was not entitled to further compensation for the period from April 24, 1985 to June 21, 1985 because the employing establishment had not been reimbursed for the other paid leave used during this period. The Office hearing representative further found that appellant was not without fault with respect to an overpayment of compensation in the amount of $1,837.80, as he was aware that he was not entitled to compensation for temporary total disability after he returned to work on a part-time basis on January 6, 1986. The Office hearing representative found that appellant accepted a compensation payment he knew was incorrect, and that the overpayment could not be waived since he was not without fault; the overpayment in the amount of $1,837.80 was deducted from the additional compensation due appellant for the 156 hours of sick leave deducted from his accrued retirement benefits.

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[2] The additional eight hours of leave without pay covered a paid holiday

On appeal, the Director of the Office filed a motion to dismiss the appeal, stating that appellant did not contest the issues of the overpayment and fault on appeal but rather sought to offset the overpayment against further compensation allegedly due. By an order dated January 14, 1988 the Board denied the Director's motion, noting "that the appeal is properly before the Board not only on the issues of the overpayment and fault, but also on the issue of whether appellant is entitled to further compensation for the period from April 24 to June 21, 1985."

Section 8129(a) of the Federal Employees' Compensation Act[3] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of overpayment is possible if the claimant is not without fault in helping to create the overpayment.

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show, among other things, that the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[4]

In the present case, the Office applied the third standard to appellant—acceptance of a payment which the payee either knew or should have been expected to know was incorrect—in finding appellant at fault in creating the overpayment.

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[3] 5 U.S.C. section 8129(a).

[4] Pursuant to *Califano* v. *Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, (1979) the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901 Overpayments, Part 2—Claims.

After a careful review of the evidence, the Board finds that appellant was not without fault in receiving the overpayment in issue.

By letters dated August 28, 1985 the Office advised appellant that he should return any compensation checks he received after he returned to work. Appellant returned to work on a part-time basis on January 6, 1986 and the Office was notified promptly of his return to work. Although the Office may have been negligent in continuing to issue appellant compensation checks for temporary total disability after it was informed he had returned to work on a part-time basis, this does not excuse appellant's acceptance of such checks which he knew, or should have been expected to, know were for an incorrect amount.[5] Even if, as appellant contends, he followed the advice of the Office in cashing the checks, this does not alter the finding that he accepted a payment which he knew was incorrect, thereby creating the overpayment of compensation.[6] Appellant therefore was not "without fault" within the meaning of section 8129(b) of the Act and the overpayment must be recovered.

The Board further finds that appellant is not entitled to further compensation for the period from April 24 to June 21, 1985.

20 C.F.R. section 10.310 as applicable to this case provides in pertinent part:

> "An employee may decide to take sick and/or annual leave in order to avoid possible interruption of income. If such employee does so decide and his or her claim for compensation is subsequently approved, such employee may arrange with his or her employing establishment to 'buy back' the leave used and have it reinstated to such employee's account. The compensation to which the employee is entitled, may be used to pay a part of the 'buy back' cost and the employee shall be obligated to pay the balance. * * * No compensation payments shall be paid, however, while the employee is still in leave status. Arrangements to 'buy back' leave, shall be made with the employing agency."

Appellant used paid leave during his absence from work during the period from April 24 to June 21, 1985, and the Office subsequently determined that he was entitled to compensation in the gross amount of $5,268.36 for this period, and correctly advised him that he could receive this compensation only if he bought back the leave he had used by refunding to the employing establishment the amount he was paid for leave.

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[5] *Robert W. O'Brien*, 36 ECAB 541 (1985).

[6] *Mary E. Hughes*, Docket No. 84-959 (issued August 8, 1985).

The only leave which was bought back from the employing establishment was the 156 hours of advanced sick leave which the Office of Personnel Management deducted from appellant's Civil Service Retirement fund and paid to the employing establishment. The remaining hours of leave appellant used from April 24 to June 21, 1985 were not bought back, and appellant is thus considered to be in a leave status for such remaining hours. He therefore cannot receive compensation payments for these hours pursuant to section 8118 of the Act and 20 C.F.R. section 10.310. The Office paid appellant the proper amount of compensation, $2,389.14 for the 156 hours of leave bought back from the employing establishment.[7] Appellant can be paid the remainder of the $5,268.36 to which the Office found him entitled for the period from April 24 to June 21, 1985 only if he buys back the remainder of the leave used during this period.

On appeal, appellant contends that the 28 hours of annual leave he had at the time of his retirement should not have been deducted from the 184 hours of sick leave he owed to arrive at the 156 hours of leave that was deducted from his retirement fund and bought back from the employing establishment. It would have been more advantageous to appellant if the 184 hours were deducted from his retirement fund and he was paid for the 28 hours of annual leave, as he could be paid compensation for the additional 28 hours that would be bought back from the employing establishment. However, the decision to deduct the annual leave from the sick leave before the "buy back" was not that of the Office but rather of the Office of Personnel Management, and the Board therefore has no jurisdiction to consider the propriety of that decision.[8]

The decision of the Office of Workers' Compensation Programs dated December 10, 1986 is affirmed.

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[7] The Office properly computed this compensation payment by multiplying the number of hours by the "monthly pay" as defined in the Act, and paying appellant 75 percent of this amount as provided in sections 8105 and 8110 of the Act.

[8] The Board's jurisdiction is limited by its Rules of Procedure (20 C.F.R. section 501) to appeals from the final decision of the Office of Workers' Compensation Act. The matter of sick and annual leave is not covered by the Act except for 5 U.S.C. section 8118(c) which provides only that an employee may use annual or sick leave and the compensation for disability does not begin until use of leave ends. *See John D. Holland*, Docket No. 86-1760 (issued April 30, 1987).

In the Matter of HERMAN W. THORNTON *and* U.S. POSTAL SERVICE, POST OFFICE, Danville, Va.

Docket No. 87-1470; Hearing April 7, 1988;
Issued May 17, 1988

Appearances: *Herman W. Thornton, pro se; Paula A. Lincoln, Esq.,* for the Director, Office of Workers' Compensation Programs.

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issues are: (1) whether appellant has established that he had a recurrence of disability from July 27, 1985 to August 8, 1985 causally related to his January 10, 1985 employment injury; and (2) whether appellant has established that he had an emotional condition which was causally related to factors of his employment.

On January 12, 1973 appellant, then a 30-year-old carrier at the Hampton, Va. Post Office, filed a claim for an injury to his right wrist, right hip, the left side of his back and his shoulder blade sustained on January 12, 1973 when he slipped on ice and fell. Appellant stopped work on January 12, 1973 and used paid leave for that day and the following day. He returned to work on January 15, 1973.

Appellant was examined on January 12, 1973 by Dr. Peter Lau who diagnosed a contusion of the right hip and sprain of the right wrist and indicated he was disabled beginning January 12, 1973.

On February 14, 1974 appellant stopped work; he filed a claim for a recurrence of disability. Appellant was hospitalized at a Veterans Administration hospital from February 14, 1974 to March 19, 1974; his discharge diagnosis was "Left sacroiliac joint pain, probably beginning Marie-Strumpell rheumatoid arthritis." He was again hospitalized at this hospital from March 25 to 30, 1974; the discharge diagnosis was "Chronic recurrent low back pain; etiology undetermined."

Appellant returned to work on April 2, 1974 and performed light duty for portions of days until April 12, 1974.

Appellant filed a claim for a recurrence of disability beginning April 13, 1974; he contended that he had severe pain in his back and left hip while delivering mail, and that the pain was becoming more frequent and severe.

On April 30, 1974 appellant was again examined at the Veterans Administration Hospital for an acute lumbosacral strain with severe low back pain radiating down his left leg following a fall at home on that day. In a May 30, 1974 report the physician who examined appellant on April 30, 1974 diagnosed acute recurrent lumbosacral strain and stated that appellant's fall at work may have aggravated his preexisting condition.

The Office of Workers' Compensation Programs accepted appellant's claim for a recurrence of disability causally related to his January 12, 1973 injury and paid him compensation for his absences from work beginning February 13, 1974.

In October 1974 Dr. Charles A. Whitten, a Board-certified neurosurgeon, performed a left facet rhizotomy at L4-5 which the doctor stated gave appellant partial relief. A January 9, 1975 myelogram done for Dr. Whitten showed no obvious defect or signs of a possible disc protrusion. In November 21, 1974 to March 19, 1975 reports Dr. Whitten set forth limits on lifting and prolonged sitting or standing. In a January 14, 1976 report Dr. Whitten stated appellant was doing very well, had no limitation in bending and had only occasional back pain.

Appellant's disability retirement was approved effective January 21, 1975.

On January 6, 1979 the Office referred appellant, the case record, and a statement of accepted facts to Dr. James W. Hayes, a Board-certified orthopedic surgeon, for an evaluation of his condition and its relation to his employment injury. In an undated report received by the Office on December 21, 1979 Dr. Hayes diagnosed "Chronic strained ligaments, lumbar spine, with nerve root irritation as manifested by pain in the left lower extremity," and stated that this condition and a right wrist condition were causally related to appellant's January 12, 1973 injury. Dr. Hayes set forth work tolerance limitations of lifting less than 20 pounds, no bending or sitting, and standing or walking less than two hours.

By a decision dated June 5, 1980 the Office reduced appellant's compensation effective July 17, 1980 based on a determination that he had a wage-earning capacity represented by the position of service clerk. By a compensation order dated March 12, 1982 this decision was vacated and appellant's compensation for temporary total disability reinstated, based on a November 3, 1981 report from Dr. Hayes which indicated he could work only four hours per day.

In a November 23, 1982 report Dr. Hayes indicated appellant's work tolerance limitations remained the same. In a January 10, 1983 report Dr. Whitten described his findings on examination and stated that appellant continued to have low back pain off and on particularly on prolonged sitting or bending or heavy lifting, and that he "could return to job which did not require prolonged sitting and lifting over 35 to 40 lbs."

On April 4, 1983 the employing establishment offered appellant reemployment as a distribution clerk. The offer stated "All assigned duties will be in strict compliance with your medical work restrictions." Appellant accepted this offer on April 5, 1983 and returned to work on April 30, 1983 at the Post Office in Danville, Va.

In an April 27, 1984 letter the employing establishment's officer-in-charge reiterated his prior oral denial of appellant's request to change his work schedule by one hour and his instruction that appellant work only on the first floor and not in the basement with one named coworker. The letter continued:

> "As you recall, I asked for your cooperation in resolving what you describe as an explosive situation which has been going on for the past year. I am still requesting your cooperation. Investigation into the problems reveals that you have been a major contributor in the discord that exists in this office. Again, I am requesting your cooperation in promoting a pleasant, peaceful, and cordial environment in the Danville Post Office.
>
> "As outlined in my Courtesy Talk, given to the employees present in the Danville Post Office on April 26, 1984, I will not tolerate discourteous and indifferent behavior from the employees of this office."

In an April 30, 1984 response to this letter, appellant stated that the environment in the Post Office in Danville was hostile to him since the day he started working there because he was employed under the rehabilitation program, because he was a preacher, that the coworker mentioned in the April 27, 1984 letter was angry at him for being a witness against him in a dispute with another coworker, that he was treated unfairly in the assignment of parking spaces, that another coworker would not allow him to use her chair, zip code book or pencils when he answered the phone, and that this coworker also ridiculed him but that he was accused of insulting her.

In a May 2, 1984 report Dr. Whitten stated that appellant was seen on April 30, 1984 "wanting a release from his work restrictions," that an examination of appellant that day was "essentially within normal limits," and "It would be my impression if the patient takes care of himself and lifts like he should that he could forego the previous restrictions and do his regular job."

In a May 22, 1984 letter appellant requested that his full seniority and pay be restored as he was fully recovered from his employment injury, and stated that he would return to Hampton if this was necessary to restore his rights and benefits.

On May 23, 1984 the employing establishment referred appellant to Dr. Edgar N. Weaver, a Board-certified neurosurgeon, for an evaluation of his condition. In a June 21, 1984 report Dr. Weaver stated that appellant complained of no leg or back pain and of no difficulty with normal physical activity, that examination was normal, and "I would certainly agree with Dr. Whitten that if he uses adequate caution and basic back-care principles, there is no reason for him not to be unrestricted in his job capacity with the post office. He would therefore be in my opinion, fully recovered."

The employing establishment reassigned appellant to regular duties as a distribution clerk. On October 18, 1984 the employing establishment issued appellant a notice of proposed removal for failure to qualify on his assigned scheme. This notice was rescinded after appellant passed the scheme examination the next day.

On January 11, 1985 appellant filed a claim for "reinjury of back from lifting heavy sacks and nerve problem from harassment of supervisor and Postmaster because of complaints about working conditions." Appellant indicated his injury occurred on January 10 and 11, 1985. Appellant stopped work on January 11, 1985 and returned on January 18, 1985.

In a January 25, 1985 report Dr. Whitten diagnosed "back sprain," indicated appellant was totally disabled from January 10, 1985 to January 18, 1985 when he could return to his regular work, and stated:

> "I felt it was wise for this patient to take off a few days from work because when I saw him on 1/14/85 he was undergoing a lot of stress at work and because of the back pain he suffered when he was lifting some bags of mail at work on 1/10/85 which I feel is an aggravation of a previous condition."

In a January 17, 1985 report Dr. Samuel J. Fletcher, Ph.D., a clinical psychologist to whom Dr. Whitten had referred appellant, stated that he saw appellant on January 15, 1985 "and found him to be showing signs of stress which I believe to be job related. Upon my recommendation, he did not go to work the next two days. Seen today, Mr. Thornton appears less stressed and can return to work although continuing treatment is indicated." In a February 7, 1985 report Dr. Fletcher diagnosed "Adjustment disorder with mixed emotional features."

In a January 30, 1985 statement the employing establishment's Postmaster stated that on January 11, 1985 he held a discussion with appellant "about his poor work performance and his inability to get along with his fellow employees," that appellant had not reported an injury or accident before this discussion, that appellant became "very argumentative and abusive during this discussion," that at the end of this discussion appellant requested a form to claim compensation which he then completed to claim an injury to his back and a nervous condition, and that appellant had complained of harassment by fellow employees and management since his reemployment on April 30, 1983.

By a decision dated March 25, 1985 the Merit Systems Protection Board found that the employing establishment "has fulfilled its obligations to the appellant in restoring him as it did," and dismissed his appeal regarding his seniority rights and his allegations of discrimination on the basis of physical handicap for lack of jurisdiction. By an April 12, 1985 decision the U. S. Postal Service found that management had not acted improperly in disapproving appellant's request for a transfer to the Hampton Post Office.

On April 3, 1985 appellant filed a claim for "job-related stress from harassment from coworkers and supervisor." In a May 2, 1985 letter appellant stated that upon his return to the regular work force in July 1984 he encountered a lot of hostility from some of his coworkers who felt management was giving him special consideration, that "When I went to management with frustration and confusion they interpreted me coming to them as hostility and caused me to be in a stressful situation," that in January 1985 "a lot of things were happening" that he could not understand and that caused him a lot of stress, and that "I felt like my supervisor was riding me and he felt like I was trying to tell him how to do his job."

In a May 9, 1985 letter appellant's supervisor stated that appellant had "several confrontations and did not get along with fellow workers during his entire period of the past two years since he came back to work," and that "any stress [appellant] felt was not from supervisor or workers"

In a May 9, 1985 letter regarding one of appellant's grievances, the employing establishment's Postmaster stated that appellant threatened his supervisor on March 22, 1985, and that he had "a history of such action with fellow employees."

By a letter dated June 6, 1985 the Office advised appellant that it had accepted his claim for a back sprain sustained on January 10, 1985 and that continuation of pay was authorized from January 11 to 17, 1985.

On July 27, 1985 appellant stopped work; he filed a claim for a recurrence of disability causally related to his January 10, 1985 employment injury. Appellant stated that he had had spasms in his back since January 10, 1985, that on July 25, 1985 he told his supervisor he was having problems with his back and left leg and was allowed to work on a stool, that he took two and one-half hours annual leave on July 26, 1985 for his back problems, that on July 27, 1985 the pain became so unbearable after about 45 minutes at work that he went home, and that his job required that he stand eight hours which made it "hard to control muscle spasms once they get started." Appellant returned to work on August 8, 1985.

In a July 29, 1985 report Dr. Whitten stated that appellant told him that standing eight hours at work aggravated his problem, that he complained of severe low back pain since July 25, 1985 with radiation into the left lower extremity, and that examination showed no limitation of motion, no paresis, equal and active deep tendon reflexes, and unremarkable straight leg raising. Dr. Whitten concluded "I am not certain what his problem is." In an August 7, 1985 report Dr. Whitten diagnosed chronic low back sprain and indicated appellant could perform light work beginning August 7, 1985. In an August 15, 1985 report Dr. Whitten noted appellant's January 10, 1985 back injury while lifting bags of mail, and stated "Presently, the patient states he has had severe back pain since 7/25/85 which was an aggravation of an existing condition dating back to an injury on the job on 1/12/73." Dr. Whitten noted that a CT scan of the lumbosacral spine performed on August 1, 1985 showed slight bulging at L4-5 and L5-S1 but no definite disc herniation, diagnosed lumbago, indicated appellant was totally disabled from July 27 to August 7, 1985, and checked "yes" to the form's question whether the disability was in any way related to the history of the injury as given.

Appellant filed a claim for a recurrence of disability beginning September 4, 1985 which he claimed was causally related to his January 10, 1985 employment injury. Appellant did not stop work.

In an October 24, 1985 report Dr. Fletcher stated that he had seen appellant on January 15, 1985 and September 9, 1985 "due to events at work which he reported as having upset him and which in my opinion were likely to be the cause of his stress," that after appellant dropped an Equal Employment Opportunity complaint "his supervisor began to harass him, doing such things as following him around to see what he did at break time, including even following him into the bathroom on one occasion," that as a result of a September 3, 1985 argument with his supervisor who told him to "shut up" appellant was suspended for seven days, that even before this argument appellant had developed headaches and a heaviness in his chest "as a result of the tensions that had again developed at work, particularly between him and his supervisor," and "On the basis of the above and considering his earlier problems, I consider Mr. Thornton again to be showing symptoms relating to stress at work, although not to the extent when he was first seen by me." Dr. Fletcher stated that appellant would benefit from individual psychotherapy sessions terminating in no more than six months assuming "that there is not a significant increase in work-related stress."

In response to an Office request for a detailed description of the work conditions and incidents to which he attributed his emotional condition, appellant stated in an October 29, 1985 letter that as a result of being a witness in a dispute between two coworkers he received a letter from the Postmaster stating he was the problem, that he attempted to have his seniority restored through EEO and grievance proceedings and by attempting to obtain a transfer to the Hampton Post Office, that the employing establishment's letter notifying him his employment would be terminated if he did not pass his scheme test in 30 days was distressing, that he was assigned a job with "a lousy day off," that he complained to his supervisor about the heat in his work area and about the substitute clerks piling the mail sacks too high, that the supervisor "began to ride me to stay in the case and keep my mouth shut," that he was kidding with a coworker when his supervisor took him to the Postmaster who told him "to keep my damn mouth shut and not speak," that he told the Postmaster not to cuss him and filed an EEO complaint "and the people came down and said that we could talk," that he received a letter of warning for supposedly calling his supervisor a weasel and threatening him and a coworker, that the Postmaster refused to give him forms to file for the Office, that his supervisor would follow him even into the bathroom and constantly monitor him, that every time he left his case he would be told to return, that his attempts to have his supervisor and the Postmaster handle the situation between him and coworkers who resented him being reemployed resulted in punishment with disciplinary actions and suspension "for trying to stand up for myself," and that his condition was "ceasing" as his supervisor had allowed him to move his case to where he could get some air and quit harassing him. Appellant also described a September 4, 1985 incident for which he was suspended for seven days, stating that his supervisor sent him to the Postmaster who refused to complete his Office claim forms and ordered him out of the employing establishment's premises at the threat of calling the police.

Further information about this September 4, 1985 incident was submitted. On September 16, 1985 appellant filed a grievance, contending that on September 4, 1985 he had stopped "for a moment to glance at the bulletin board," that his supervisor told him to return to his case which he did, that he told the supervisor that he may want to file a grievance and was told there wasn't enough time, to get back to work, and to shut up, that a further "exchange of words" then occurred in which he told the supervisor he had the right to speak and that the supervisor had no right to shake his finger in his face or threaten him, that he then informed the supervisor that he was "punching out because I was under stress from him harassing me," that the supervisor ordered him off the premises, that every time he asked for forms to go to the doctor he was subjected to some kind of discipline, that he was the only employee on whom records on the amount of work done were kept, and that he felt he was discriminated against because other employees were allowed to speak and get a drink of water but he was not. The employing establishment's manager of customer services denied appellant's grievance based on findings that investigation showed that on September 4, 1985 appellant was observed away from his work place and not performing his duties, he was instructed by his supervisor to return to work, that he started to his work location but stopped and returned to his supervisor's desk and stated he wanted to file a grievance, that he was told that time did not permit the filing of a grievance until later and instructed to return to work, that appellant returned to his work location but "constantly left his case for trips to the water cooler and to continue to argue with his supervisor who was sitting at his desk," that appellant was again instructed to stay in his work location and perform his duties, that appellant "then asked his supervisor for disciplinary action in a taunting manner and continued to stop work and try to argue with him," that he was again instructed to return to work, that at 4:09 a.m. appellant rang off the time clock stating "you're harassing me" and left the work floor, that he returned to discuss a grievance with his supervisor but was told there was not time, that appellant then left the building, that appellant was not told to leave the work area and did not request permission to do so, that his actions adversely affected the dispatching of mail, and that the supervisor's requests to report to his work location and perform his duties could not be refused by appellant. The U. S. Postal Service by a December 4, 1985 decision denied appellant's grievance at the next level, finding that he left the building without permission and without performing the duties for which he was employed.

In a November 1, 1985 reply to appellant's October 29, 1985 statement, appellant's supervisor stated that appellant's inability to get along with his coworkers was "caused by his attitude and work habits," that his disciplinary action was due to his attitude, work habits and the general disturbances he caused, and that he had not been followed. In a November 12, 1985 letter the employing establishment's Postmaster stated that he could not sustain any of appellant's allegations about substitute clerks harassing him, that appellant threatened to retaliate if these clerks would not leave him alone, that he had never been instructed to keep his mouth shut, that he had been cautioned on numerous occasions about antagonizing his fellow employees, not performing his duties, and causing general disturbances, that appellant was given a letter of warning for threatening his supervisor and calling him a weasel but that this letter of warning had been reduced to a discussion, that he had never been refused Office forms but when he requested them at 3 or 4 a.m. they were not available until office personnel arrived at about 8 a.m., that appellant's talks with his supervisors and the Postmaster resulted in appellant becoming belligerent, that appellant's conversations with his fellow employees usually ended up with appellant claiming they were harassing him or him wanting to fight them, that for this reason he had been told on numerous occasions to be quiet and do his job, and that the September 4, 1985 incident had nothing to do with completion of Office forms but rather involved appellant being very belligerent, following the Postmaster around the office and asking questions and making statements and refusing to leave until told the police would be called.

By a February 13, 1986 decision the National Labor Relations Board found that it did not appear that the employing establishment violated the National Labor Relations Act. The decision stated:

> "More specifically, the investigation failed to establish that your supervisor . . . issued you written warnings, followed you on the job or suspended you because you filed grievances on

> your behalf or engaged in other Union or protected concerted activities. Accordingly, further proceedings are not warranted, and I am refusing to issue complaint in this matter."

In a November 20, 1985 report Dr. Whitten stated that appellant sustained a back sprain when lifting bags of mail at work on January 10, 1985, and "This is to verify that his most recent office visits of 7/29/85 and 8/6/85 were related to his 1/10/85 injury."

In a February 25, 1986 report Dr. Fletcher stated that appellant's "comments appeared to be of good reliability with no evidence that he was malingering," that appellant reported when first seen that he was being harassed by a few other employees and received no support from management, that management told him he could not speak to other employees and to keep his mouth shut, that appellant's belief that coworkers were harassing him by doing things such as throwing his coffee container in the trash and breaking his radio were not delusional but were in fact statements "of what had been happening," that he had not seen appellant from March 7, 1985 until September 9, 1985 when appellant reported that he had been handling things well but that the harassment had continued, that following his action in dropping an EEO complaint his "supervisor began to harass him, including following him around to see what he did on his break times; he reported that on at least one occasion his supervisor followed him into the bathroom," that following an argument with his supervisor in which he was told to shut up appellant received a one-week suspension, that appellant reported that the Postmaster was also involved in harassing him, and that when he was last seen he "was doing well in all respects" and stated that for all practical purposes the harassment had stopped. Dr. Fletcher diagnosed "adjustment disorder with mixed emotional features," and concluded:

> "Mr. Thornton appears to be a man who was making satisfactory work adjustment until the onset of what appears to be harassment and subsquent stress-related symptoms on the part of a few fellow employees and management. There was nothing in my contacts with him including the evaluation to indicate that Mr. Thornton was in any way of a basically suspicious or paranoid nature. He made good progress during the treatment periods noted above and I think stands a good chance of making a continued positive adjustment in the future. As far as his current condition is concerned, there is no psychological reason that I can determine that would prevent him from con-

tinuing to function in his regular work activities with the Postal Service."

By a compensation order dated June 5, 1986 the Office found that appellant failed to submit substantive factual evidence to establish that his alleged emotional condition was caused, aggravated, or precipitated by factors of his federal employment.

Appellant requested a hearing, and submitted a March 4, 1986 note from Dr. Charles G. Tabor of the Veterans Administration stating in its entirety "This patient has a chronic back strain and would do well to have a few minutes rest from time to time while working." He also submitted copies of notes prepared by his supervisor and the Postmaster regarding incidents involving appellant. These notes showed that on November 2, 1984 appellant's supervisor told him that he should be using his time to increase the accuracy of his city scheme instead of talking and kidding with other employees as he and the other distribution clerks would soon be checked for the accuracy of their distribution. On November 5, 1984 the supervisor noted that he reminded appellant to stop talking and work the mail, as he was observed all morning talking to everyone he encountered about matters other than the mail. On November 8, 1984 the supervisor noted he told appellant several times to work the mail and stop talking, and that appellant told him he could not stop him from talking, that he then told appellant that his actions were not in keeping with a letter on the bulletin board about employees talking, that he was not satisfied with appellant's performance and that he was causing confusion and disturbance on the work floor, that appellant did not want to recognize that he was receiving an official discussion, and that he warned appellant about shaking his hand and finger in his face during a discussion. On January 10, 1985 appellant's supervisor noted he saw appellant who wanted to discuss the personal problems he was having with coworkers; the supervisor noted that appellant seemed to have a chip on his shoulder and thought the other employees were after him. On January 11, 1985 in a discussion with appellant the Postmaster told him not to talk to other employees, to stop complaining every day, to improve his productivity, and that if he continued to harass his supervisor and coworkers disciplinary action would be taken. Appellant requested a written statement that he could not talk and was told to look at the notice on the bulletin board, and then requested an Office claim form and was referred to his supervisor. The Postmaster noted that later that work day appellant had to be instructed to remain seated and to be quiet, and that appellant was shaking his finger at the Postmaster. On March 22, 1985 appellant asked his supervisor for an Office claim form for an occupational illness or disease, and that he was advised by the supervisor that he was not authorized to give him the form until the Office gave the employing establishment the paperwork or authorization to complete the form. Appellant then reportedly called the supervisor "a little weasel" and said he wanted to meet him outside, and appellant was told to return to work. On March 25, 1985 appellant asked the supervisor if an apology would resolve the matter, and the supervisor told him he would accept the apology but not withdraw the letter of warning whereupon appellant did not apologize. On June 3, 1985 the supervisor noted he twice told appellant about his excessive loud talking. On July 6, 1985 an acting supervisor noted he told appellant several times to stay in his work area and not talk to other employees; the last time appellant complained it was too hot in his work area. On July 8, 1985 appellant's supervisor noted that appellant was loud and heckling coworkers all morning by hollering across the room about matters unrelated to work, and that he was confronted about not doing his job. On September 4, 1985 the Postmaster noted appellant was following him around and had to be asked to leave, and that he would not describe how his supervisor was harassing him other than stating he was "riding him." On September 12, 1985 appellant's supervisor noted an argument between appellant and a coworker similar to other arguments between the two. On March 15, 1986 appellant and a coworker were told by the Postmaster not to discuss union business or grievances without his supervisor's permission.

At the hearing held on November 12, 1986 appellant testified that his supervisor lied about not telling him to shut up and about his request for seniority, that management did not honor his request to correct the practice of piling mail bags too high resulting in his January 10, 1985 injury, that he found a hangman's noose on his case one day, that he had no problems since he slapped a substitute clerk back three or four times in front of his supervisor, that the Merit Systems Protection Board decision on his seniority was based on inaccurate information, that his coffee container was thrown out, that he was not allowed to sit in a coworker's chair, that he was given extra work by his coworkers, that his supervisor did not believe him that his mail was moved to the wrong section by a coworker, and that his suspension in September 1985 was over obtaining Office forms.

By a decision dated and made final on March 26, 1987 an Office hearing representative found that appellant's alleged harassment by coworkers was self-generated and not related to his work duties, that his dissatisfaction with his treatment by coworkers and his employing establishment was a noncompensable personal problem, and that the treatment by his coworkers, the alleged harassment by management over filing an EEO complaint about his seniority, and his inability to regain his seniority did not constitute factors of employment giving rise to coverage under the Federal Employees' Compensation Act.

On May 19, 1986 an Office medical adviser reviewed the medical evidence on appellant's back condition and stated that there was "absolutely nothing to suggest any organic illness of any sort, and there is nothing to suggest that there have ever been any objective findings." This Office medical adviser stated that no diagnosis was established, that appellant had only subjective complaints and no condition related to his employment, and that the disc bulging shown on the CT scan did not mean anything in light of the finding of no definite herniation.

By a compensation order dated August 25, 1986 the Office found that appellant failed to meet his burden of proof to establish that his claimed recurrence of disability beginning July 25, 1985 was causally related to his January 10, 1985 employment injury.

Appellant requested a hearing before an Office hearing representative which was held on April 7, 1987. Appellant testified that he returned to his regular work on January 18, 1985, that on July 25, 1985 his back and leg pain became unbearable, and that he was again performing his regular work.

By decision dated and made final on April 30, 1987 an Office hearing representative found that appellant had not met his burden of proof to establish that his recurrence of disability was causally related to his employment injury.

Appellant has the burden of establishing a causal relation between the recurrence of a disabling condition and the employment injury by reliable, probative and substantial evidence.[1] This burden includes the necessity of furnishing reasoned medical opinion evidence showing a causal relation between the recurrence of disability and the employment injury.[2]

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[1] *Phillip F. Cannella*, 31 ECAB 1780 (1980); *John E. Blount*, 30 ECAB 1374 (1979).

[2] *Steven J. Wagner*, 32 ECAB 1446 (1981).

The Board finds that appellant has not met his burden of establishing a causal relation between his disability from July 27, 1985 to August 8, 1985 and his January 10, 1985 employment injury.

The Office accepted that appellant sustained a back sprain on January 10, 1985 and authorized continuation of pay from this date until he returned to work on January 18, 1985.

Appellant again stopped work on July 27, 1985 and filed a claim for a recurrence of disability causally related to his January 10, 1985 employment injury. Appellant submitted reports from Dr. Whitten in support of this claim, but none of these reports contains a reasoned medical opinion on the causal relation between the recurrence of disability and the January 10, 1985 employment injury. In his initial report following appellant's work stoppage on July 27, 1985 Dr. Whitten stated, in a July 29, 1985 report, that he was not certain what appellant's problem was. The statement in Dr. Whitten's August 15, 1985 report—"Presently, the patient states he has had severe back pain since 7/25/85 which was an aggravation of an existing condition dating back to an injury on the job on 1/12/73"—lends no support to appellant's claim for a recurrence of disability related to his January 10, 1985 injury, as it relates his back pain beginning July 25, 1985 to a January 12, 1973 injury. In addition, this statement is ambiguous, as it is unclear whether Dr. Whitten is expressing his own or appellant's opinion that the back pain beginning July 25, 1985 was an aggravation of the condition dating back to the January 12, 1973 employment injury. In this August 15, 1985 report Dr. Whitten also checked "yes" to the form's question whether the disability was in any way related to the history of the injury as given.[3] In a November 20, 1985 report Dr. Whitten stated that appellant's office visits on July 29, 1985 and August 6, 1985 were related to his January 10, 1985 employment injury. This report, like his other reports, contains no rationale for the doctor's opinion on causal relation.[4] For this reason, Dr. Whitten's reports are insufficient to meet appellant's burden of establishing a causal relation between his recurrence of disability from July 27, 1985 to August 8, 1985 and his January 10, 1985 employment injury.

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[3] An affirmative answer, without explanatory rationale, to the question causal relation on an Office form is of minimal probative value and does not constitute the type of medical evidence needed to satisfy the employee's burden of proof. *Peggy D. Goodrum*, 30 ECAB 755 (1979); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

[4] Medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet appellant's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

The Board further finds that further development of the evidence is needed on the issue of whether appellant has an emotional condition causally related to factors of his employment.

In *Lillian Cutler*, the Board stated:

> "Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment."
>
> * * *
>
> "Where the disability results from his emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position." [5]

In the present case an Office hearing representative, by a decision dated and made final on March 26, 1987, applied the principles set forth in *Lillian Cutler* and concluded that none of the incidents and conditions implicated by appellant constituted factors of employment giving rise to coverage under the Federal Employees' Compensation Act. Many of the incidents and conditions implicated by appellant relate to his frustration over not being permitted to work in a particular environment or to hold a particular position, and thus are not covered under the Act. However, some of the incidents and conditions implicated by appellant do constitute factors of employment giving rise to coverage under the Act. To cite one example, the verbal altercations and tense relationship with his supervisor have been considered such "factors of employment" by the Board.[6]

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[5] *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *Neil F. Carney*, 36 ECAB 289 (1984). (The Board stated that appellant's description of several instances in which he was criticized by his supervisor for reasons which he felt were unjust presented a medical question whether the stress appellant experienced, if disabling, was compensable); *Georgia Kennedy*, 35 ECAB 1151 (1984). (The Board stated that situations there enumerated by appellant which would be deemed conditions of employment as enunciated in *Cutler* included "alleged verbal harassment and altercations with her supervisors" and "public scoldings.")

As appellant has implicated factors of his employment as the cause of his emotional condition and has presented medical evidence which lends some support to his claim,[7] a medical question is presented on the issue of whether appellant had an emotional condition causally related to his employment and, if so, whether this condition disabled him for work. To resolve this question, the Office should prepare a statement of accepted facts distinguishing between the incidents and conditions of his employment implicated by appellant which constitute "factors of employment" coming within coverage of the Act and those that do not.[8] The Office should refer this statement of accepted facts, the case record, and appellant to a Board-certified psychiatrist for a reasoned opinion as to whether appellant had an emotional condition which was causally related to factors of his employment, and, if so, for an opinion on the periods of disability related to such condition. After such further development as it deems necessary, the Office shall issue a *de novo* decision on the issue of appellant's emotional condition.

The decision of the Office of Workers' Compensation Programs dated April 30, 1987 is affirmed; the decision of the Office dated March 26, 1987 is set aside and the case remanded to the Office for further action in accordance with this decision of the Board.

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[7] The reports from Dr. Fletcher are insufficient to meet appellant's burden of proof because they provide little rationale, do not detail the periods of disability, and do not distinguish between incidents and conditions covered under the Act and those not so covered. *Susan D. Bence*, Docket No. 87-133 (issued April 22, 1987).

[8] In cases where working conditions are alleged as a factor in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding the working conditions prior to submitting the case to a medical expert for an opinion on causal relationship. *John A. Snowberger*, 34 ECAB 1262 (1983).

In the Matter of FRANCIS FOWLER *and* U.S. POSTAL SERVICE, POST OFFICE, South Suburban, Ill.

Docket No. 87-1598; Submitted on the Record;
Issued May 19, 1988

ORDER ON PETITION FOR RECONSIDERATION

Before MICHAEL J. WALSH, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether appellant has established that she is entitled to any benefits under the Federal Employees' Compensation Act.

On September 13, 1970 appellant, then a 42-year-old mail handler, was accidently struck at work by a hand truck loaded with mail and was pinned against a column; she sustained torn ligaments around her left ankle with areas of edema and ecchymosis, contusions of the left hip, thigh, knee and ankle with strained muscles, edema and ecchymosis, and contusions of the lumbar area and sacrum. Appellant stopped work that day and was hospitalized on complete bedrest until September 21, 1970 when a walking heel cast was applied to her left ankle; appellant was discharged on September 24, 1970. Appellant had the cast removed on November 6, remained partially disabled until November 13, was discharged from treatment on November 28, and was cleared to return to light duty on November 30, 1970.

On January 14, 1971 appellant underwent surgery for removal of a large tender lipoma and ganglion cyst on the anterolateral aspect of her left ankle; she underwent surgery on May 14, 1971 for removal of scar tissue and a fibrolipoma from the left lateral malleolus and a tunnel release for the peroneal tendons.

The Office of Workers' Compensation Programs accepted appellant's claim for contusions of the left hip, thigh, knee and ankle, for a ganglion cyst on the left ankle, and for acceleration of degenerative arthritis of the lumbar spine. The Office paid temporary total disability compensation beginning September 14, 1970.[1]

By letter dated November 30, 1983 the Office advised appellant that medical reports indicated that she would soon be able to return to work; the Office referred her to a vocational rehabilitation counseling service. By reports dated January 27 and 30, 1984 a rehabilitation counselor advised appellant that although employment at the Port Huron Post Office was not possible, a position at the Royal Oak Post Office was being coordinated. The counselor noted that because appellant did not drive, she would need to relocate from Port Huron. Vocational rehabilitation progress notes during the month of April 1984 indicated that it was unlikely that appellant would be financially able to afford moving expenses or the living costs for the area around the potential job.

In a May 17, 1984 letter the employing establishment offered appellant a position as a mail distributor at a general mail distribution facility in Troy, Michigan. Appellant accepted the offer and returned to work on June 11, 1984.

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[1] Appellant was granted a schedule award for a 10 percent permanent impairment of the left lower extremity from December 5, 1972 to June 24, 1973 for a total of 28.7 weeks of compensation.

In a June 18, 1984 vocational rehabilitation report the counselor noted that appellant had arranged for transportation from her home in Port Huron to the Troy, Michigan general mail facility and was pursuing additional ride-sharing arrangements with coworkers. Appellant therefore decided to remain in Port Huron, Michigan. In a July 9, 1984 report the counselor noted that the distance from appellant's home to her job was approximately 65 miles one way, and noted that appellant was paying a friend to drive her to and from work each day. The counselor indicated that appellant was not interested in learning to drive and was unwilling to relocate. The counselor advised appellant that she would be in jeopardy of losing her job should the transportation arrangements fail, because her absence from work would not be related to her medical condition. In an August 24, 1984 report the counselor noted that there were no employment supervisory problems or complaints involving the appellant and noted that all reports had been very favorable. In an August 28, 1984 report to appellant's attending physician the counselor noted that appellant appeared to have readjusted successfully to her position as a mail distribution clerk. In a September 4, 1984 report the counselor noted that the possibility of appellant transferring to the Port Huron branch office was purely an employing establishment matter and did not involve the Office; in a September 11, 1984 report the counselor noted that appellant had interviewed at Port Huron and was advised that she would only be guaranteed two hours of work per day as a "part-time flex" employee, during which she would have 28 days to learn the new scheme. The Counselor noted that appellant had until September 17, 1984 to notify the Postmaster of her decision. In a September 17, 1984 letter to appellant's rehabilitation specialist her supervisor noted that appellant had not yet decided about requesting a transfer to the Port Huron Post Office. The counselor advised appellant that her case file would soon be closed because the appellant's current situation was beyond the scope of either Office or rehabilitation assistance. Appellant continued to work at her job at the Troy general facility without problems.

By letter dated June 21, 1985 appellant's attorney contended that appellant was being forced to drive 60 miles one way from her home to the employing establishment. He stated that appellant was paying $250.00 every two weeks to have a person provide her with transportation and that after that appellant rented a room in a Mt. Clemens hotel for $180.00 per week and had a coworker provide her with a ride. Appellant's counsel argued that appellant's present position was not suitable work within the spirit and letter of the Federal Employees' Compensation Act.

By letter dated July 3, 1985 the employing establishment injury compensation specialist advised the Office that during a meeting on July 1, 1985 appellant was advised of her reassignment rights and reminded that after her interview with the Port Huron Postmaster the previous fall regarding her reassignment she was supposed to get back in touch with him but that she never did. By letter dated July 12, 1985 a vocational rehabilitation specialist advised appellant's attorney that although appellant was living with her mother when she reported an interest in being restored to work with the employing establishment, she indicated that she was willing to move to the Royal Oak area for employment. He noted that ultimately appellant was offered employment which she accepted, but that she decided to remain in the Port Huron area and commute to work.

In an August 29, 1985 letter appellant's attorney indicated that he was not asserting that appellant could not do the work she was currently performing, but that the question of suitability was based on the fact that the job was so far away from her residence.

By letter dated October 21, 1985 appellant's attorney advised the employing establishment that in Michigan an employer had a duty to accommodate a handicapped individual and that unless further assistance in placing appellant in the Port Huron facility was received, a handicap discrimination claim would be filed. The attorney advised that in the very near future appellant was going to miss a single day of work due to the length of her commute and that at that time a CA-7 would be filed as a test case.

By letter dated April 16, 1986 appellant's attorney requested reconsideration on whether the job offer made to appellant was suitable; he also indicated that appellant was claiming compensation for November 6 and 7, and December 5 and 6, 1985 for missed work due to her transportation difficulties.

By letter decision dated July 10, 1986 the Office found that appellant's job as a limited duty mail distribution clerk at the Royal Oak branch of the employing establishment was suitable employment. The Office stated that the finding was supported by the following facts: appellant participated in the reemployment process with the knowledge that the light duty position would be in Royal Oak; she indicated a willingness to relocate if necessary to reduce problems in getting to work; there was no evidence that the job requirements exceeded her medical restrictions; and she had successfully carried out her duties for two years. The Office concluded that appellant had demonstrated her ability to get to and from the work site.

By letter dated July 23, 1986 appellant requested a hearing before an Office hearing representative. A hearing was held on February 25, 1987 at which appellant testified that one person drove her from her home to Mt. Clemens, a distance of 38 miles. A coworker would then meet her and drive her to work, a distance of 15 miles. She stated that the first person to whom she paid $100.00 per week drove a small car which was very uncomfortable, causing her to develop back pain, stiffness, and leg cramps while riding in his car. Appellant testified that she had moved from Chicago, where she had lived at the time of her injury, to Port Huron to be with her mother, and she explained that she moved into a house which she inherited from her father that was next door to her mother's house. She indicated that she did not want to move because she would have to pay mortgage and rent if she did relocate closer to the employing establishment. Appellant also submitted for consideration a July 23, 1986 report from Dr. William R. Kries, an orthopedic surgeon, who stated as follows:

> "[Appellant] needs to avoid heavy activities, heavy lifting, repeated bending. She is unable to stand for long periods of time and needs a stool which she does use at work. An additional problem is that of sitting at long periods of time in a fully seated position which causes her to have increased symptoms with traveling. She is currently commuting over 100 miles a day to work and I think that if she could relocate her employment to greatly diminish the amount of traveling necessary, this would be to her overall advantage."

In a decision dated and finalized April 16, 1987 the Office hearing representative found that appellant had failed to establish that her employment-related back condition prevented her from commuting to and from her job. He further found that appellant had not established that the cost and distance of her daily commute was unreasonable, and therefore that appellant had not established that the limited duty distribution clerk position was unsuitable for her. The Office hearing representative affirmed the July 10, 1986 Office decision.

The Board finds that appellant has not established that she is entitled to any benefits under the Federal Employees' Compensation Act.

To have a compensable claim under the Federal Employees' Compensation Act a claimant must have a condition, defined as a physical impairment arising from her employment that is disabling in fact at the time for which compensation is sought, which results in loss of wage-earning capacity.[2] There is no provision in the Act for payment of compensation for disability arising from conditions unrelated to employment.[3] Proof of sustained work and earnings, such as exists in the instant case, rebuts the presumption of continuing total disability.[4] Neither the Board nor the Office should consider an abstract or hypothetical claim for disability and wage loss, or for any other benefit available under the Act.[5]

In the present case appellant participated in vocational rehabilitation with knowledge of the location of the potential job; she accepted an offer of employment and returned to work on June 11, 1984. At no time did the Office threaten to discontinue all of appellant's benefits should she refuse the Royal Oak job offer. If appellant felt that her condition and situation precluded her from accepting the job offer she should have pursued it during vocational counseling and refused the offer of employment. After successfully returning to work appellant explored the possibility of a transfer to an employing establishment branch located closer to her home, however after interviewing with the Port Huron postmaster appellant never followed through with her transfer attempt; at that time appellant was informed that such a transfer was purely an employing establishment matter and did not involve the Office. Instead appellant sought counsel who requested reconsideration and alleged that appellant was being forced to drive over 100 miles round trip per day to perform her job. Appellant's attorney claimed that the job at which appellant was working was unsuitable for her due to the back pain caused by commuting each day to and from her job.[6] Appellant however continues to work at the position she accepted. She therefore has not established to any disability compensation, wage loss, or other benefit provided by the Act.[7]

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[2] *See Phyllis L. Bombriant Whalen*, 8 ECAB 94 (1955); *see also, Williamine Gale Vance*, 8 ECAB 249 (1955).

[3] *See, supra, Williamine Gale Vance.*

[4] *Jacob Ornstein*, 14 ECAB 190 (1962).

[5] *See Elizabeth A. Schmidt*, 14 ECAB 118 (1962); *Florence E. Niziol*, 14 ECAB 372 (1963).

[6] The Board notes that on appeal appellant's attorney submitted a brief which summarized the contents of his previous correspondence with the Office, and which restated appellant's contentions made during the February 25, 1987 hearing.

[7] Appellant's attorney stated in an April 16, 1986 letter that appellant was claiming benefits for four days she did not work in November and December 1985 "due to transportation difficulties." However, there currently is no evidence in the record that appellant's inability to get to work on those dates was related to disability due to her employment injury.

Appellant submitted a July 23, 1986 report from Dr. Kries which indicated that appellant's back pain was aggravated by her commuting to and from work, however he did not state that she was disabled or was required to stop working due to an aggravation of her condition caused by the commuting. Compensation cannot be awarded for prospective disability.[8] Appellant has therefore not shown that she has sustained any disability or lost any wages or benefits for which she could submit a claim under the Act.

The decisions of the Office of Workers' Compensation Programs dated April 16, 1987 and July 10, 1986, are hereby affirmed.

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[8] *Russell D. Knowles*, 39 ECAB 380 (1988).

In the Matter of LELA GRAHAM *and* U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, Wisc.

Docket No. 87-1557; Submitted on the Record;
Issued May 19, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant had abandoned her request for a hearing before an Office hearing representative pursuant to 5 U.S.C. section 8124(b).

On April 19, 1985 appellant, then a 37-year-old distribution clerk, filed a claim for carpal tunnel syndrome, nervous hypertension, severe pain paresthesia, paraspinal myofascitis which included 1-2 to 1-5, dermatomes, and emotional stress.

In an August 14, 1985 letter appellant was advised that her carpal tunnel syndrome and hypertension conditions would be considered under their respective, prior claims.

In a medical report dated August 29, 1985 Donald F. Yoder, an osteopath, found appellant had sustained a left sacroiliac sprain and left greater trochanteric bursitis. He stated that if the problem would have been caused by employment factors, it would have been cured by that time. In an additional report of December 16, 1985 Dr. Yoder stated x-rays of the spine revealed lipping over the anterior aspect of various vertebrae, with a subtle sclerosis of the lumbar spine. Dr. Yoder indicated that the employee's work may have caused this condition. Dr. Elliot L. Coles, Board-certified orthopedic surgeon and Dr. Min Shung Chen, a Board-certified radiologist, examined x-rays of appellant and concluded no subluxation of the spine was present. In an April 14, 1986 memorandum, an Office medical adviser indicated that the medical evidence of record was insufficient to establish subluxation or any of the employee's complaints considered in the claim. In a May 21, 1986 decision, the Office found that appellant had failed to meet her burden of proof in establishing she sustained subluxation, paresthesia, paraspinal myofascitis, dermatomes, and emotional stress.

In a June 19, 1986 letter, appellant requested a hearing before an Office hearing representative. The Office scheduled a hearing on October 23, 1986 which was postponed for good cause at the request of the appellant as her union representative, Timothy Adams, was ill and could not appear. A hearing was rescheduled for February 18, 1987. Without explanation in the file another hearing date was scheduled for May 22, 1987.

The record contains a May 21, 1987 telephone memorandum which indicated Mr. Adams contacted the Office at 3:00 p.m. but left no message.

By telephone memorandum dated May 21, 1987 the Office documented a call from Mr. Adams indicating that Mr. Adams called the Office at 12:15 p.m. leaving a number to reach him until 1:00 p.m. The memorandum noted that Mr. Adams would call back with another number in which to reach him after 1:00 p.m. The memorandum stated:

> "A10-348977 Lela Graham—hearing 10:00. Tim will not be able to be here. Please reschedule hearing for either Chicago or Milwaukee whichever is sooner."

Attached to the memorandum was a note by the Office indicating that Mr. Adams failed to call back with a new phone number.

In a June 16, 1987 decision the Office found that appellant had abandoned her request for a hearing because she had failed to appear for the hearing and had not shown good cause for such failure to appear. The Office noted that the May 21, 1987 telephone call from Mr. Timothy Adams did not provide sufficient notice.[1]

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[1] The Board notes that in Mr. Worth's letter requesting an appeal and seeking a new hearing date, he details numerous phone call attempts to reach the Office's hearing representative in order to get the May 22, 1987 hearing rescheduled. Mr. Worth also indicated his explanation as to why he could not attend the scheduled hearing and efforts made in this behalf. However, Mr. Worth's letter is not a matter of record and is not within the Board's jurisdiction to review. *See* the Board's *Rules of Procedures*, section 501.2(c). In addition, the Board notes that Mr. Wright's letter is more than 10 days after appellant's scheduled hearing. *See* 20 C.F.R. section 10.135.

The Board finds that the Office of Workers' Compensation Programs properly found that appellant had abandoned her request for a hearing before an Office representative.

Section 10.137 [2] (20 C.F.R.) of the regulations states:

> "Postponement; withdrawal or abandonment of request for hearing.
>
> "(a) A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in the assessment of costs against such claimant.
>
> "(b) A claimant may withdraw a request for a hearing at any time by written notice to the Office representative before the hearing is held, or on the record at the hearing.
>
> "(c) A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure of the claimant to request another hearing within 10 days or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, another hearing will be scheduled. Unless extraordinary circumstances such as hospitalization, a death in the family or similar circumstances which prevent the claimant from appearing are demonstrated failure of the claimant to appear at the third scheduled hearing shall constitute abandonment of the request for a hearing."

In the present case, appellant and appellant's authorized representative failed to appear at the time and place set for the third scheduled hearing. Appellant failed to demonstrate any "extraordinary circumstances such as hospitalization, a death in the family, or similar circumstances" which had prevented her from attending the hearing. Accordingly, as appellant failed to appear at the third scheduled hearing, and failed to demonstrate good cause for her failure to appear, appellant has abandoned her request for a hearing under the Act.

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[2] 20 C.F.R. section 10.137 (effective June 1, 1987).

The decision of the Office of Workers' Compensation Programs dated May 21, 1986 is hereby affirmed.

In the Matter of Thomas H. Harris *and* U.S. Postal Service, Motor Vehicle Service, Baltimore, Md.

Docket No. 87-1714, Issued May 19, 1988

ORDER REMANDING CASE

Appellant filed an application for review of a May 11, 1987 and July 10, 1987 decisions of the Office of Workers' Compensation Programs. The May 11, 1987 decision denied appellant's request for a hearing as untimely since the request was not made within the thirty day time limitation provision of section 8124 of the Federal Employees' Compensation Act. The Office stated that it had considered the matter in relation to the issue involved and denied appellant's hearing request on the basis that the issue involved a medical question which may be resolved on a reconsideration.

The July 10, 1987 decision by the Office denied reconsideration of appellant's claim as the application was found to be *prima facie* insufficient to warrant review of the Office's March 6, 1987 decision, which rejected appellant's compensation claim finding that he had failed to meet his burden of proof in establishing that his high blood pressure condition was aggravated by his federal employment.

The Board notes that appellant's authorized representative submitted an April 9, 1987 letter informing the Office that he had not received a copy of its March 6, 1987 decision and requested a hearing before an Office hearing representative. The Office received this letter on April 13, 1987. By decision dated May 11, 1987 the Office denied appellant's hearing request as it was found to be untimely.

The Board notes that the Federal (FECA) Procedure Manual, Chapter 2-1400(10)(f), Part 2—Claims provides that:

> "Copies of the compensation order must be sent to the claimant, the official superior, and all parties, etc., representing or acting on behalf of the claimant, such as attorneys and employee or veteran's organizations."

The Board has held that a decision under the Act is not deemed to have been issued unless both the appellant and the appellant's authorized representative is sent a copy of the decision.[1] Therefore, the Office's March 6, 1987 decision was not properly issued as appellant's authorized representative was not sent a copy of that decision. On remand the Office shall issue a *de novo* decision regarding the subject matter of the March 6, 1987 compensation order, with copies sent to the appellant, appellant's authorized representative and the employing establishment as provided in the Federal (FECA) Procedure Manual.

The time limitation provisions under the Act concerning appellant's right to appeal, request a hearing or request reconsideration of that decision will commence with the issuance of the Office's decision.

IT IS ORDERED that the March 6, 1987, May 11, 1987, and July 10, 1987 decisions of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for issuance of a *de novo* decision on the subject matter of the March 6, 1987 compensation order, with copies to appellant, his authorized representative and the employing establishment as provided for in the Federal (FECA) Procedure Manual, Chapter 2-1400, Part 2—Claims

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[1] *Charles A. Hinton*, 39 ECAB 756 (1988).

In the Matter of Kelmeth Kilgore *and* Department of the Navy, Mare Island Naval Shipyard, Vallejo, Calif.

Docket No. 88-203; Submitted on the Record;
Issued May 26, 1988

Before David S. Gerson, Michele von Kelsch, Willie T.C. Thomas

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for review on the merits pursuant to section 8128(a) of the Federal Employees' Compensation Act.

On August 11, 1976 appellant, then a 32-year-old firefighter, injured his right arm in the course of his federal employment. The Office of Workers' Compensation Programs accepted his claim for epicondylitis of the right elbow and surgery on January 30, 1977 and began payment of compensation for appropriate periods of disability.[1]

On April 14, 1978 appellant was separated from his employment and began receiving disability retirement benefits from the Office of Personnel Management (hereinafter "OPM").

On July 21, 1980 appellant began receiving compensation from the Office based on a 58 percent loss of wage-earning capacity.

By letter dated February 28, 1983 the Office informed appellant that he had been receiving dual benefits from the OPM and the Office concurrently since July 21, 1980 and that as the receipt of dual benefits is prohibited under the Federal Employees' Compensation Act he must make an election retroactive to July 21, 1980 between the two benefits by completing the enclosed "Election of Benefits" form. Appellant submitted the completed form, electing Civil Service Retirement Act benefits administered by the OPM. Based on the election the Office suspended appellant's compensation effective February 24, 1983.

By letter dated October 26, 1983 the Office informed appellant that it had made a preliminary determination that there had been an overpayment of compensation in the amount of $25,274.47 for the period July 21, 1980 through February 23, 1983 and that he was at fault in this matter because he knew or should have known that he was not entitled to receive dual benefits, and informed him that he may, within 30 days, submit evidence or arguments and request a hearing or reevaluation on the record on the issues whether there was an overpayment in the stated amount and whether he was at fault with regard to the overpayment, and if not, whether the overpayment should be waived.[2]

Appellant did not submit any evidence or arguments, and did not request a hearing or reevaluation on the record.

By letter decision dated May 25, 1984 the Office found that there was an overpayment of compensation in the amount of $25,274.47 because appellant "received compensation and OPM benefits concurrently from July 21, 1980 through February 23, 1983," and that he was without fault with regard to the overpayment because he had not been advised by the Office that he "could not receive dual benefits," but that the overpayment was not subject to waiver because overpayments resulting from the election of OPM benefits were not subject to waiver.[3] The Office informed appellant that the OPM had refunded $4,428.04, leaving a balance of $20,846.43 to be recovered.

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[1] The record indicates appellant received continuation of pay from August 19 through September 6, 1976; temporary total disability compensation from January 12 through July 17, 1977; compensation for wage loss from July 18, 1977 through March 2, 1978; temporary total disability from March 3, 1978 through August 1, 1979; schedule award for a five percent impairment of his right arm, from August 2, 1979 through November 19, 1979; and temporary total disability compensation from November 20, 1979 through January 2, 1980.

[2] The Office also determined there was an overpayment of compensation from November 20, 1979, the date appellant's schedule award should have expired, and January 2, 1980, the date the payments were terminated. *See* note 1, *supra*. The Office decided, however, that this overpayment should not be recovered because, *inter alia*, appellant was not notified of the period of the schedule award until January 30, 1980.

By letter dated May 23, 1984 the OPM informed the Office that it would reimburse the Office in "monthly installments, the first for $260.61 and subsequent installments of $260.58."

By letter to the Office dated June 18, 1987 appellant stated:

> "I would like to find out how I can get this payment reduced.
>
> "At this time it has become a burden on me as I'm not working and this is my only source of income."

By letter dated July 1, 1987 the Office requested that appellant complete an Overpayment Recovery Questionnaire form with "copies of supporting evidence where appropriate," so that the Office may determine whether the "refund payments [should] be reduced."

Appellant submitted a partially completed Overpayment Recovery Questionnaire form in which he did not list any income or expenses. The only financial figures he provided were a list of his current assets totalling $2,228.00. In an attached letter dated July 7, 1987 appellant contended that he was without fault with regard to the overpayment and that he needed more "money desperately" to "put [his] life back together" and get custody of his son following a divorce.

In a letter dated August 12, 1987 the Office informed appellant:

> "It is unclear from your letter whether you are requesting a waiver or a reduction in your monthly payment from your OPM benefits. . . .
>
> "However, in order to consider a reduction in your monthly payment from your OPM benefits toward your . . . overpayment you must indicate your total gross income from all sources. You indicated no earnings from OPM . . . on the questionnaire."

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[3] The Office based this finding on FECA (Federal) Procedure Manual, Part 2, Chapter 2-807, para. 12(a)(2) (July 1982) which stated:

> "Certain monies owed to or collectible by the OWCP [Office] are not subject to the waiver provisions of section 8129. These include * * * (2) Money owed the OWCP as a result of a beneficiary's election of OPM retirement benefits in lieu of previously paid compensation."

This provision is now contained in Part 2, Chapter 2-901(3)(b) of the Procedure Manual (rev. 1984).

* * *

> "Please submit some form of evidence of the monthly amount you receive from . . . OPM benefits, preferably a photocopy of the check . . . within 20 days so we can determine if your monthly payment can be reduced."

Appellant did not submit any additional evidence.

By letter decision dated September 28, 1987 the Office denied appellant's request for reconsideration, finding that the request was *prima facie* insufficient to warrant reconsideration because appellant failed to submit the necessary information regarding his monthly income and expenses.

The Board finds that the Office did not abuse its discretion in refusing to review the case on its merits.

To require the Office to reopen a case for reconsideration under section 8128(a) of the Federal Employees' Compensation Act,[4] a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered.[5]

In requesting that the Office reconsider its previous decision that there was an overpayment of compensation in the amount of $24,274.47, that the overpayment was not subject to waiver, and that the overpayment should be recovered by offset from his OPM benefits in monthly installments of $260.58, appellant submitted a partially completed Overpayment Recovery Questionnaire form. However, he did not provide any figures for his income and expenses despite being informed by the Office that such information was necessary for a reevaluation of his repayment schedule. Appellant also contended that his monthly payments should be reduced because he wanted to "put his life back together" and get custody of his son. However, without specific financial information regarding his income and expenses, such general contentions do not have any probative value on the question whether his repayment schedule should be adjusted. Appellant also contended that he was without fault with regard to the overpayment. However, as the Office had already found he was without fault, these arguments have no bearing on the issues involved. The Board therefore finds the Office did not abuse its discretion in refusing to review the case on its merits.

On appeal appellant stated, "Currently my income is approximately $1,000.00 monthly, with half of this going to general living expenses. . . . If necessary, I could send you a detailed listing of both my income and expenses." As the Office's previous letter indicated it would reevaluate appellant's repayment schedule once such a "detailed listing of both [his] income and expenses" has been submitted, appellant may submit such information to the Office and request a reevaluation of his repayment schedule.[6] The Board notes, however, that it lacks jurisdiction to review the amount of offset from OPM disability retirement benefits to recover an overpayment of compensation because it involves an adjustment of benefits from another governmental agency.[7]

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[4] 5 U.S.C. section 8128(a).

[5] *Betty G. Myrick*, 35 ECAB 922 (1984).

The decision of the Office of Workers' Compensation Programs dated September 28, 1987 is hereby affirmed.

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[6] *See generally* FECA (Federal) Procedure Manual, Part 5, Chapter 5-1300. *See also* FECA Bulletin No. 87-19 (issued February 3, 1987) which provides guidelines for determining minimum offset amounts from continuing benefits to recover an overpayment, including offset from OPM retirement benefits.

[7] *See Marshall L. West*, 36 ECAB 490 (1985).

In the Matter of HATTIE DRUMMOND *and* U.S. POSTAL SERVICE, POST OFFICE, Akron, Ohio

Docket No. 88-49; Submitted on the Record; Issued May 27, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof in establishing that the position of barber fairly and reasonably represents appellant's wage-earning capacity effective July 5, 1987.

On December 20, 1973 appellant, then a 29-year-old part-time letter carrier, filed a claim for compensation alleging that she injured her lower back on December 6, 1973 while lifting packages onto a mail truck. Appellant stopped work on December 7, 1973 and has not returned to work.[1] She was first treated for her injury on December 10, 1973 by Dr. Herbert Thompson, who diagnosed lumbosacral strain.[2] On January 21, 1974 the Office of Workers'

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[1] Appellant was terminated from her federal employment on September 24, 1976 on the grounds that there was no indication that she would be able to return to her letter carrier duties.

[2] The record reflects that appellant has a preexisting transitional vertebra congenital condition unrelated to factors of her federal employment.

Compensation Programs accepted appellant's claim for chronic lumbosacral strain and she was paid total disability compensation.

The record indicates that appellant attended, and completed, a course in cosmetology during the period 1980 to 1981.[3] Medical evidence submitted by Dr. Mollins dated May 19, 1980, indicated that appellant was capable of sedentary work and that "the conditions in a beauty shop [were] certainly favorable and where she is under no pressure to produce a certain amount of work every eight hours; I think she can probably handle it. . . ."

The Office referred appellant to a private rehabilitation specialist who noted that appellant had a cosmetologist's license and that she had worked as a beautician intermittently for the period August 6, 1981 to January 10, 1982. After conducting a survey of the job market, the rehabilitation specialist noted that it was difficult to find employment as a cosmetologist and recommended that appellant pursue employment as a barber. However, appellant needed to undergo further training as a barber.

The record indicates that appellant began part-time custodial work on April 5, 1984, earning $4.00 an hour.

On September 24, 1986 the Office agreed to sponsor appellant's attendance at Akron Barber School. Subsequent to the approval appellant notified her rehabilitation specialist that she no longer wished to pursue training as a barber and refused to attend the classes at the Akron Barber Shool. She indicated that she wished to continue her part-time custodial work. Appellant also expressed interest in returning to a limited-duty position with the Postal Service. However, after appellant failed a drug test she was not offered such a position.

A work restriction evaluation completed by Dr. Paul Anthony Steurer, Jr. on February 19, 1985 stated that appellant was able to work eight hours a day, five days a week, with a restriction of lifting up to 10 to 20 pounds, no twisting and intermittent sitting, walking, lifting, bending and standing. These restrictions were within the job requirements of barber.

In an Office memorandum dated August 7, 1987 the Office noted that according to the Federal Employees' Compensation Act section 8113 appellant's loss of wage earning capacity should be based on the position of barber, not custodial worker.

The Office determined that, as appellant's part-time wages as a custodial worker did not accurately reflect her earning capacity, the loss of wage-earning capacity would be based upon the position of barber. On August 10, 1987 the Office determined that the position of barber was suitable for appellant, given her physical limitations, experience and the availability of the position in appellant's geographic area. The average weekly pay of a barber in appellant's geographic area was $71.91. Applying the formula set forth in the *Shadrick* decision [4] to this information, the Office determined that appellant had a 56 percent loss of wage-earning capacity.

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[3] The record is unclear as to the date as well as the sponsorship of appellant's attendance in cosmetology school.

By letter compensation order dated August 25, 1987 the Office adjusted appellant's compensation to reflect her loss of wage-earning capacity, effective July 5, 1987, based upon the position of barber.

On appeal appellant alleges that she wishes to return to a light-duty position with the Postal Service and that the medical evidence of record fails to establish that she is able to perform the duties of barber.

The Board finds that the Office properly applied Section 8113(b) of the Act in basing appellant's loss of wage-earning capacity on the position of barber.

Pursuant to Section 8104 of the Act [5] the Office requested that appellant undergo vocational rehabilitation to learn barber skills. The record reflected that appellant had a cosmetology license, and as the job market for cosmetologists was extremely competitive, the rehabilitation specialist recommended that she undergo training to become a barber. Appellant, however, advised her rehabilitation specialist that she did not wish to pursue training as a barber and refused to undergo vocational rehabilitation. In applying the principles of section 8113(b) of the Act the Office determined that had appellant undergone vocational training as directed, she would have been able to be employed as a barber. The Office consequently determined appellant's loss of wage-earning capacity based upon the position of barber, as opposed to the position which she presently held, custodial worker.

Section 8113(b) of the Act states in pertinent part:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, after finding that in the absence of the failure the wage-earning capacity of the individual would

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[4] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] Section 8104 of the Act states that the Secretary of Labor may direct a disabled individual whose disability is compensable under the Act to undergo vocational rehabilitation. Federal Employees' Compensation Act, 5 U.S.C. section 8104 (1974).

> probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[6]

The Office informed appellant that she should undergo training as a barber. Appellant stated that she did not wish to undergo such training, without providing "good cause" for her decision. As appellant's wage-earning capacity would have increased if she had participated in the rehabilitation program as directed (appellant was only earning $4.00 an hour as a part-time custodial worker) the Office properly applied section 8113(b) in basing appellant's loss of wage-earning capacity on the position of barber.[7]

The Board further finds that the Office has met its burden of proof in establishing that the position of barber fairly and reasonably represents appellant's wage-earning capacity.

Once the Office of Workers' Compensation Programs has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits it has the burden of justifying a subsequent reduction in compensation benefits.[8]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injury and the degree of physical impairment, his usual employment, his age and vocational qualifications, and the availability of suitable employment.[9] In accordance with the concept of wage-earning capacity, generally, when the Office makes a medical determination of partial disability and of the specific work restrictions, the claimant's case should be referred to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, which fits the employee's capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage earning capacity.[10]

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[6] 5 U.S.C. section 8113(b).

[7] *See Rafael Rivera*, 8 ECAB 583 (1956).

[8] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[9] 5 U.S.C. section 8115(a). *See also William H. Goff*, 35 ECAB 581 (1984); *David Smith*, 34 ECAB 409 (1982); Larson, *The Law of Workers' Compensation*, section 57.21.

In the instant case, the Office followed the established procedures for determining appellant's employment-related loss of wage-earning capacity.

The Office properly referred the case record to an Office rehabilitation specialist who is also a wage-earning capacity specialist, who selected a position listed in the Department of Labor's *Dictionary of Occupational Titles,* which fit appellant's capabilities in light of her physical limitations education, age and prior experience. The physical requirements of the position of barber are compatible with appellant's physical limitations, as noted by Dr. Steurer on a work restriction evaluation dated December 19, 1985.

The Office then proceeded to determine the prevailing wage rate and availability in the open labor market of barber by relying on information furnished by the Office rehabilitation specialist who, based on his research determined that there were a sufficient number of barber positions available within appellant's commuting area.

The Office properly applied the principles set forth in the *Shadrick* decision to determine appellant's loss of wage-earning capacity. The Office, using information provided by the employing establishment, determined that appellant's pay rate as of December 6, 1973, the date her disability commenced, was $163.43 per week and that appellant was capable of earning $71.91 per week as a barber. Using the formula set forth in the *Shadrick* decision the Office then computed a loss of wage-earning capacity of 56 percent or $91.52 per week and awarded appellant compensation in the net amount of $141.00 payable every four weeks which amount is based on a 75 percent rate, increased by applicable cost-of-living adjustments.

The Board finds that the Office followed the proper procedures in determining that appellant has no more than a 56 percent loss of wage-earning capacity for which she is being compensated and that the position of barber fairly and reasonably represents her wage-earning capacity effective July 5, 1987.

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[10] *See Warren A. Cook*, 34 ECAB 1535 (1983). *See* Federal (FECA) Program Memorandum No. 77 (as amended May 9, 1983) which provides:

> "In determining the employee's loss of wage-earning capacity, the Office must take the following steps: (1) ensure that the record contains a detailed current description of the employee's ability to perform work in a disabled condition, including capacity to lift, stand, walk, etc.; (2) ensure that the record contains a complete description of all the duties of the offered position, and all its physical requirements; (3) ensure that the work offered to the claimant is consistent with the work capacity described in the medical report. If there is any question about compatibility, the case must be referred to the Office medical adviser or to the attending physician."

See also Mary A. Henson, 36 ECAB 565 (1985).

While appellant alleges that she would prefer to return to a position with the Postal Service, the record indicates that the Postal Service declined to offer appellant a limited-duty position after she failed a drug test. The merits of the Post Office's decision are not within the jurisdiction of this Board, and any questions she has with respect to returning to such employment should be addressed to her former employing establishment.

The decision of the Office of Workers' Compensation Programs dated August 25, 1987 is hereby affirmed.

In the Matter of BARBARA A. NUGENT, claiming as widow of KENNETH NUGENT *and* NEW YORK CITY POLICE DEPARTMENT, New York, N.Y.

Docket No. 88-257; Submitted on the Record;
Issued May 27, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment of compensation in the amount of $19,181.30 for the period from July 1, 1983 to August 31, 1985 and, if so, whether she was without fault in this overpayment, and; (2) whether the Office of Workers' Compensation Programs properly adjudicated an overpayment of compensation in the amount of $64.00 for the period from August 1, 1982 to June 30, 1983.

On August 21, 1971 appellant's husband, a local law enforcement officer, was killed in the performance of his duties. Appellant filed a claim for benefits under section 8191 of the Federal Employees' Compensation Act on behalf of herself and seven children.

By a letter dated June 24, 1975 the Office of Workers' Compensation Programs advised appellant that it had determined that her husband's death occurred under circumstances which came within the coverage of the Act, and that she was entitled to compensation on behalf of her children after they reached age 18 only if they were full-time students. After obtaining information from the New York City Police Department showing the amount of pension to which appellant was entitled and showing that her children were not entitled to any pension benefits, the Office on September 17, 1975 determined that appellant was not entitled to any benefits under the Act on her own behalf because the benefits she was receiving from the New York City Police Department exceeded her entitlement under the Act. The Office further determined that she was entitled to compensation under the Act on behalf of her children in the amount of 75 percent of her husband's monthly pay, share and share alike. Appellant's oldest three children, Kathleen, Michael, and Kevin completed their full-time course of studies in April 1974, January 1977 and May 1978, respectively.

Appellant's next oldest child, Brian born on June 5, 1959, did not return to school for the term beginning January 1981. On January 6, 1981 the Office determined that effective January 1, 1981 appellant was entitled to compensation on behalf of her three remaining children in the amount of 70 percent of her husband's monthly pay, plus applicable cost of living increases.

By a decision dated August 12, 1982 the Office found that effective August 1, 1982 appellant was entitled to $732.00 per month on behalf of her remaining children instead of the $1,656.00 per month she had been receiving. The Office explained that after a review of its payment procedures relating to beneficiaries under section 8191 of the Act, "all future compensation benefits commencing August 1, 1982 will be based on the actual number of beneficiaries (i.e., if there is a widow and two children and the widow is not eligible for benefits under the FECA because her comparable benefits exceed FECA, the children will be paid at 15 percent a piece instead of 40 percent for the first child and 15 percent for the second)."

Appellant submitted documents showing that her son Glenn, born March 6, 1962, was pursuing a regular full-time course of study in college from September 1980 to June 1984. She also submitted statements showing her daughter Tara, born July 10, 1965, was pursuing a regular full-time course of study in college from September 1983 to June 1984, and for the school year beginning September 1984. Appellant also at this time had a daughter Colleen, born October 13, 1969, living at home.

By a letter dated January 28, 1986 the Office advised appellant that she had received an overpayment of compensation which occurred because the administrative change of August 1, 1982 was erroneously calculated resulting in an overpayment from August 1, 1982 to about January 1, 1985, because Tara quit school some time after October 23, 1984 but benefits were paid on her behalf until August 31, 1985, and because benefits were paid on January 20, 1985 in the amount of 55 percent for her husband's monthly pay rate rather than at the 30 percent allowed for two beneficiaries. The Office notified appellant that effective September 1, 1985 she would receive $367.38 every 28 days, reflecting payment for one child at 15 percent of the monthly pay.

By a note received by the Office on February 11, 1986 appellant informed the Office that her daughter Tara left school in January 1985.

On July 8, 1986 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of $19,245.30 which occurred because "Administrative change effective 8/1/82 was paid incorrectly and Tara ceased student status effective 1/19/85 but was paid up to 8/31/85." The Office further found that appellant was at fault in the matter of the overpayment for the reason that "on 8/12/82 you were advised formally of the reduction in benefits effective 8/1/82 and you were aware that once Tara stopped being a student her Federal entitlement ceased."

In a July 15, 1986 letter appellant contended that she was without fault in the matter of the overpayment, as she was not informed of the amount of compensation she would receive for her children, and the amount changed frequently. Appellant also stated that she believed she had sent notice that Tara left school.

By a final decision dated August 27, 1987 the Office found that appellant received an overpayment of compensation in the amount of $19,181.30 which occurred because she was paid too much compensation from July 1, 1983 to January 18, 1985, and an incorrect amount from January 19, 1985 to August 31, 1985 on behalf of Tara who was not a student during this period. The Office found appellant was at fault in the matter of the overpayment because she was advised on August 12, 1982 that her compensation would be reduced to $732.00 per month and her monthly check increased to $1,346.00 per month on July 1, 1983, and because she was aware that her daughter Tara was only entitled to compensation while she was a student.

By another final decision dated August 27, 1987 the Office found that appellant received an overpayment of compensation in the amount of $64.00 which occurred because she was paid compensation in the amount of $732.00 per month beginning August 1, 1982 when the correct amount was $716.00 per month. The Office found she was not at fault in the matter of this overpayment but refused to waive the overpayment in the amount of $64.00 on the basis that appellant had not submitted financial information as requested.

The Board finds that the case is not in posture for decision on the overpayment in the amount of $64.00.

With regard to the overpayment in the amount of $64.00, the Board finds that the Office did not properly adjudicate this overpayment, as it did not comply with its regulations. The Office's regulations require that before seeking to recover an overpayment the Office shall provide the individual with written notice of its preliminary finding, and of the right to request a prerecoupment hearing or submit additional written evidence.[1] These regulations further provide for a final decision only after such a hearing or submission of evidence, or if no hearing is requested or no evidence submitted within 30 days.[2]

The Office did not follow these regulations with respect to the overpayment of compensation in the amount of $64.00. The Office did not issue a preliminary determination and give appellant the opportunity to respond in a hearing or by written submission, as required by its regulations. The case will therefore be remanded to the Office for proper adjudication of the overpayment in the amount of $64.00.

The Board finds that appellant received an overpayment of compensation in the amount of $19,181.30 for the period from July 1, 1983 to August 31, 1985.

The Office's calculations show that during the period from July 1, 1983 to August 31, 1985 appellant was paid $36,244.09, which was 55 percent of her former husband's monthly pay rate plus cost of living increases for this period. When the Office calculated the correct amount of compensation due during this period, based on 30 percent of appellant's former husband's monthly pay rate from July 1, 1983 to January 19, 1985, and 15 percent of this pay rate from January 20 to August 31, 1985, the total amount due was $17,062.79. The difference in these amounts is $19,181.30, the amount found as the overpayment.

5 U.S.C. section 8133 provides that in the event of a death from an injury in the performance of duty, the Office will pay monthly compensation equal to the following percentages of the monthly pay of the deceased employee:

> "(2) To the widow or widower, if there is a child, 45 percent and in addition 15 percent for each child not to exceed a total of 75 percent for the widow or widower and children. (3) To the children, if there is no widow or widower, 40 percent for one

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[1] 20 C.F.R. section 10.321(d).

[2] 20 C.F.R. section 10.321(g-i).

> child and 15 percent additional for each additional child not to exceed a total of 75 percent, divided among the children share and share alike."

Before the administrative change made effective August 1, 1982 the Office paid appellant as beneficiary of her children under subsection (3). By the administrative change the Office determined that in situations such as that of appellant, subsection (3) did not apply, as there was a widow (though not one entitled to compensation). Thus after the administrative change the most appellant could receive on behalf of her children was 30 percent, which is the maximum 75 percent allowed for a widow and children under subsection (2) minus the 45 percent appellant would receive for herself as the widow if she were not receiving comparable benefits from the State of New York. Beginning July 1, 1983 and continuing to August 31, 1985 the Office paid appellant at the rate of 55 percent of her former husband's monthly pay. She was, under subsection (2), entitled to only 30 percent of the monthly pay from July 1, 1983 to January 19, 1985, and to only 15 percent after January 19, 1985 when she had only one remaining child entitled to benefits.

The Board further finds that appellant was not "without fault" in the matter of the overpayment in the amount of $19,181.30.

The Office's regulations provide:

> "In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who:
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> > '(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
> >
> > '(2) Failed to furnish information which the individual knew or should have known to be material; or
> >
> > '(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.'"[3]

With regard to the overpayment which arose because appellant was paid at 55 percent of her former husband's monthly pay instead of the maximum of 30 percent to which she was entitled, the Board finds appellant was with fault. In its August 12, 1982 letter the Office clearly advised appellant of the administrative change effective August 1, 1982 and the effect that it would have on her compensation payments, namely that they would decrease from the $1,656.00 per month she had been receiving to $732.00 per month. This letter also advised appellant of the basis of this change, that she would receive 15 percent for each child rather than 40 percent for the first child and 15 percent for the second. Thereafter appellant received checks in the amount of $732.00 per month for almost one year.[4] Beginning with the check covering the period beginning July 1, 1983, appellant received monthly checks in the amount of at least $1,346.00 per month. Appellant should have been expected to know that these checks for almost twice as much as the Office advised her she would be receiving were incorrect.[5] Even though the Office may have been negligent in issuing appellant these checks for an improper amount, this does not excuse appellant's acceptance of such checks which she should have known were for an incorrect amount.[6]

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[3] 20 C.F.R. section 10.320(b).

The Board further finds that appellant was at fault in the overpayment of compensation which arose because she was paid compensation on behalf of her daughter Tara from January 20 to August 31, 1985, a period during which Tara was not a student and therefore not entitled to benefits under the Act.

Tara left school in January 1985, and appellant did not advise the Office of this fact until February 11, 1986. As appellant was advised by the Office's August 12, 1982 letter and elsewhere that compensation was paid at a specified percentage for each child and since appellant had only one remaining eligible child after Tara left school, appellant knew or should have known that Tara's status regarding school was material. Appellant therefore failed to furnish information she knew or should have known was material, and she is at fault in the creation of this overpayment.

As appellant was not "without fault" in the overpayment of compensation in the amount of $19,181.30 for the period from July 1, 1983 to August 31, 1985, this overpayment is not subject to waiver.[7]

The decision of the Office of Workers' Compensation Programs dated August 27, 1987 which found that appellant received an overpayment of $19,181.30 for the period from July 1, 1983 to August 31, 1985 and that she was at fault in this overpayment is affirmed. The Office's decision dated August 27, 1987 that appellant received an overpayment of $64.00 is set aside and the case remanded to the Office for further action in accordance with this decision of the Board.

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[4] Although the amount of $732.00 per month was incorrect, it was close to the correct amount of $716.00 per month, and the method of calculation was correctly stated in the August 12, 1982 letter.

[5] *See Milton Dixon*, Docket No. 88-224 (issued December 31, 1987).

[6] *Robert W. O'Brien*, 36 ECAB 541 (1985).

[7] 5 U.S.C. section 8129 provides that overpayments "shall" be recovered except from individuals who are "without fault" and who meet the other criteria of this section. Where an individual is with fault, the overpayment must be recovered, even though it resulted from negligence by employees of the government. *Frank Hampton Bratton*, 31 ECAB 114 (1979).

In the Matter of JACKIE B. WILSON *and* TENNESSEE VALLEY AUTHORITY, SEQUOYAH NUCLEAR PLANT, Chattanooga, Tenn.

Docket No. 88-629; Submitted on the Record;
Issued May 27, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant had any disability on or after May 17, 1985, causally related either to a September 27, 1984 employment injury or to factors of his federal employment.

On December 14, 1984 appellant, then a 44-year-old pipefitter, filed a claim for compensation alleging that he injured his back on September 27, 1984 when he carried a tool box weighing approximately 45 pounds in the performance of duty. The record indicates that appellant has a preexisting condition of spondylolisthesis and spondylolysis at L-5. Appellant also sustained prior low back strains in the performance of duty on July 18, 1977, June 24, 1978, April 3, 1979, March 11, 1980 and November 12, 1980. Following the November 12, 1980 injury appellant returned to work on January 7, 1981 with work restrictions, and had remained in a light-duty capacity until the September 27, 1984 injury. Appellant stopped work on December 17, 1984 due to the September 27, 1984 injury and returned to limited-duty work on February 7, 1985.

In a report dated December 11, 1984 Dr. Thornton D. Perkins, a Board-certified orthopedic surgeon, diagnosed appellant's condition as spondylolisthesis at L-5 with defect in posterior element and opined that the condition was either caused or aggravated by the September 27, 1984 employment injury.

On February 5, 1984 the Office of Workers' Compensation Programs accepted appellant's claim for lumbar strain and he received appropriate compensation during the period December 17, 1984 to February 7, 1985.

Dr. Perkins released appellant for light-duty work on February 6, 1985 with restrictions on prolonged stooping, bending, or climbing, no crawling, and no frequent lifting over 25 pounds, not to exceed 35 pounds. Appellant returned to work on February 7, 1985 with the above restrictions.

In a report dated March 29, 1985 Dr. Perkins stated as follows:

> "This patient has preexisting spondylolysis at L–5 without any further slipping of L–5 forward on the sacrum. He has been seen here in the past on multiple occasions with the same type of problem. The patient was always treated in a conservative manner and able to return to his job as a welder with some restrictions on bending and lifting, crawling and climbing. He was returned to light-duty work after his visit of February 6, 1985."

On May 17, 1985 appellant was terminated from his federal employment on the grounds that his employing establishment no longer had any work within his physical limitations.

On June 4, 1985 appellant filed a claim for recurrence of disability causally related to the September 27, 1984 injury commencing May 17, 1985. Appellant noted that his employing establishment no longer had any work for appellant within his medical restraints after that date.

In a report dated July 10, 1985 Dr. Perkins stated as follows:

> ". . . Appellant has chronic low back strain which recurs in episodes and he has an underlying disorder of the spine which is spondylolysis at L–5. The patient has episodes of back pain with or without any occupational injury. His spondylolysis as I have told you before preexisted the date of injury with his last episode September 1984."

On July 23, 1985 an Office medical adviser reviewed Dr. Perkins' report and concluded that the Office should further develop the record to determine whether appellant's employment aggravated his preexisting spondylolysis at L–5.

In a report dated August 8, 1985 Dr. Perkins opined that appellant's back condition was aggravated by the September 27, 1984 incident. In a report dated September 11, 1985 Dr. Perkins further noted that:

> "[Appellant's] back problem will never be resolved and the aggravation of this condition would be expected to be temporary, but with this set of circumstances, I would imagine that this patient would continue to complain at such a level of discomfort and he will not be able to resume his regular job."

On November 29, 1985 the Office referred appellant, together with the case record and statement of accepted facts to Dr. Dennis Coughlin, a Board-certified orthopedic surgeon, for an evaluation.

In a report dated December 7, 1985 Dr. Coughlin gave a history of injury, his findings upon physical examination, and concluded that appellant had a chronic back problem, spondylolisthesis and spondylolysis, which "has been aggravated at yearly intervals over the past seven or eight years." In an additional report dated April 11, 1986 Dr. Coughlin noted, after a subsequent examination of appellant, that "[his] back condition has probably returned to its base line (pre-injury) state. I feel that there are no objective findings referable specifically to the September 17, 1984 injury." Dr. Coughlin concluded that appellant was not totally disabled, but that he had restrictions with respect to heavy lifting, bending and stooping.

By compensation order dated July 1, 1986 the Office rejected appellant's claim for recurrence of disability on the grounds that the weight of medical evidence failed to establish that appellant had any disability on or after May 17, 1985 causally related to the September 27, 1984 lumbar strain. The Office relied upon Dr. Coughlin's opinion which found that appellant's back strain had resolved and that it had returned to "its base line state."

By letter dated July 29, 1986 appellant requested a hearing before an Office hearing representative.

A hearing was held on April 8, 1987. At the hearing appellant submitted additional medical evidence in support of his claim. In an August 27, 1987 report Dr. George W. Shelton, a Board-certified orthopedic surgeon, gave a history of injury, his findings upon physical examination and concluded that appellant had a preexisting spondylolisthesis which was aggravated on September 27, 1984. In a March 24, 1987 report Dr. Shelton further stated that appellant was physically unable to do any manual work due to his back condition. In a report dated April 6, 1987 Dr. Perkins stated that his examination of appellant on March 27, 1987 showed no significant changes over the last two years. Dr. Perkins added that appellant had a ten percent permanent impairment of the body as a result of the spondylolysis "which is a preexisting condition that was aggravated by rather ordinary lifting and pulling at work."

By decision dated May 4, 1987, finalized that same day, the Office hearing representative concluded that the weight of the medical evidence established that the effects of the September 27, 1984 work injury had resolved by February 7, 1985, the date appellant returned to work, and that any disability for work on and after May 17, 1985 was the result of his preexisting, non-injury-related back condition.

In a letter dated June 1, 1987 appellant requested reconsideration of the Office's decision. In support of his claim he submitted a report dated June 4, 1987 from Dr. Shelton which stated as follows:

> ". . . It would seem to me that the record itself would be pretty specific that this whole problem is certainly related to his multiple injuries. In other words, [appellant] had a bad back and he shouldn't have been doing the type of work he was doing and this was the reason he was rehurting it and reactivating it all during this period of time from 1977 until the last time we saw him in March, 1987. There is no question but that this patient's aggravation has persisted and will continue to persist and this was the basis for which we stated that we felt like he was not able to do any manual work where he had to stand, stoop, bend or change positions."

On October 13, 1987 an Office medical adviser reviewed Dr. Shelton's report and concluded that there was no objective evidence put forth by Dr. Shelton to support appellant's continued disability.

By compensation order dated November 5, 1987 the Office denied modification of the prior order on the grounds that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision.

The Board finds that appellant has met his burden of proof in establishing a recurrence of total disability effective May 17, 1985, causally related to factors of his federal employment.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such a light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[1]

In the present case, following appellant's September 27, 1984 injury, he returned to work a light-duty capacity on February 7, 1985. Appellant remained a light-duty capacity until May 17, 1985, at which time he was terminated from his federal employment on the grounds that his employing establishment no longer had any work within his physical limitations. As no light duty was available for appellant after this date, the nature and extent of his light-duty job requirements changed and he established that he was totally disabled for the job he held at the time that he was injured.[2]

The medical evidence of record, however, does not indicate that appellant is totally disabled for any employment and therefore on remand the Office should determine appellant's loss of wage-earning capacity in accordance with the principles established in the *Shadrick* case.[3]

The decisions of the Office of Workers' Compensation Programs dated May 4, 1987 and November 5, 1987 are hereby set aside and the case remanded for further development of the case record and a *de novo* decision consistent with this decision.

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[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] "Disability" under the FECA means the "incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." *George J. Kemble*, 35 ECAB 370 (1983); *Billy G. Snow*, 35 ECAB 419 (1983).

[3] *Albert C. Shadrick*, 5 ECAB 376 (1953).

In the Matter of NEWTON KY CHUNG *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Honolulu, Hawaii

Docket No. 88-687; Submitted on the Record;
Issued May 31, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether stressful factors of appellant's federal employment caused a permanent or temporary aggravation of his underlying conditions of diabetes, hypertension and peptic ulcer.

On March 31, 1985, appellant, 53 years old and formerly an air traffic controller with the employing establishment, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that his hypertension and peptic ulcers were caused by stressful factors of his federal employment and that such factors aggravated his preexisting diabetic condition. Appellant stated that he first became aware that these conditions were caused and aggravated by his federal employment at the time of his annual medical examination at the employing establishment performed on March 13, 1967. The record indicates that appellant was terminated from his federal employment on August 2, 1981 as a result of the air traffic controllers' strike.

In support of his claim, appellant submitted a U.S. Department of Labor article on job stress, a medical journal article entitled "Hypertension, Peptic Ulcers and Diabetes in Air Traffic Controllers," and two personal narrative statements in which appellant described stressful factors of his employment which he believed caused and aggravated his hypertension, peptic ulcers and diabetes. In his statements, appellant stated that he first discovered he had a diabetic condition while in the military and that it was determined that his diabetic condition was service connected.

With respect to medical evidence, appellant submitted the September 17, 1982 report of Dr. Casimer Jasinski, Board-certified in preventive medicine, and formerly a regional flight surgeon with the employing establishment, who stated that he first examined appellant at his 1967 annual examination performed on March 13, 1967 and found appellant to have high blood pressure and a history of peptic ulcers and consequently, not qualified for the position of air traffic controller under the employing establishment's health standards. Dr. Jasinski stated that notwithstanding appellant's medical disqualification for his job, he was permitted to continue working as an air traffic controller through issuance of a medical waiver because his work was considered satisfactory. Dr. Jasinski reported that in all annual medical examinations performed on appellant subsequent to 1967, appellant was found to be medically unqualified for his position but continued to receive medical waivers and worked under medical waiver until his termination from employment in August 1981. Dr. Jasinski noted that at appellant's annual medical examination performed on March 15, 1968, appellant was found to have mild to moderate diabetes. Dr. Jasinski stated that he last examined appellant on September 7, 1982 and that, at that time, appellant still suffered from hypertension and diabetes and was being treated for each with medication and that the combination of such medication "may be mind altering and affect [appellant's] judgment." Dr. Jasinski concluded his report as follows:

> "There is no doubt in my mind that [appellant] clearly did not meet the [employing establishment's] medical standards for his job.
>
> "It is my considered opinion that [appellant] was, at the time of his separation from [the employing establishment], still is, and will continue to be, totally disabled for useful and efficient service in the position of air traffic [controller]."

Appellant also submitted the June 29, 1985 report of Dr. Werner G. Schroffner, a Board-certified endocrinologist, who stated that he had been treating appellant since January 1983 for diabetes mellitus and hypertension and stated in relevant part:

> "The decision as to whether a job such as air traffic controller causes common disorders such as adult onset diabetes and hypertension is not based on any medical judgment but much more a matter of insurance compensation policy. Stress factors such as involved in air traffic control may make the control and treatment of diabetes and hypertension a little more difficult but certainly do not cause these diseases. To make a closer association of job and disease would be artificial in my opinion."

By compensation order dated January 22, 1986, which incorporated a memorandum summarizing the evidence, the Office of Workers' Compensation Programs denied appellant's claim for compensation on the basis that he failed to meet his burden of proof by furnishing medical opinion evidence showing a causal relationship between factors of his employment and his hypertension, diabetes and ulcers.

By letter dated February 27, 1987, appellant, through his authorized counsel, requested reconsideration of the Office's January 22, 1986 decision. In requesting reconsideration, appellant's counsel indicated that appellant was not alleging that stressful factors of his federal employment caused his diabetes, hypertension and peptic ulcer condition, as implied by the report of Dr. Schroffner, but that such factors aggravated these conditions to the point of total disability for employment.

In support of his request for reconsideration, appellant submitted his employing establishment medical records, his medical records from the Kaiser Permanente Medical Group and the February 18, 1987 report, with accompanying medical reference attachments, of Dr. John H. C. Kim, a Board-certified endocrinologist and appellant's treating physician for the past ten years. In his February 18, 1987 report, Dr. Kim reviewed appellant's medical history, discussed the stressful factors of appellant's employment, noting appellant's decline in health during his employment, reviewed the medical literature pertaining to the effects of stress on hypertension, ulcers and diabetes and concluded as follows:

> "From my review of the records, the medical literature, the test results and my personal examinations and treatment of [appellant], I conclude that the hypertension, peptic ulcer, and diabetes were all undoubtedly aggravated and intensified to the point of disability by the stress of his work as indicated in detail in the patient's [employing establishment] annual physical examination records and his Kaiser medical records. The severe physical and psychological stress experienced by the patient while he was working as an air traffic control specialist is the single constant that is clearly identifiable as the significant factor in explaining his deteriorating and disabling condition, which resulted in his disqualification from employment and subsequent disability retirement."

Following receipt of appellant's request for reconsideration and the evidence submitted in support thereof, the Office requested Dr. Maurice Eliaser, Jr., a Board-certified cardiologist, acting as an Office medical consultant, to review appellant's case record, which included the evidence submitted on reconsideration, and a statement of accepted facts prepared by the Office, and to respond to questions submitted by the Office, particularly whether the evidence of record supported that appellant's hypertension, peptic ulcers and diabetes were causally related to factors of his employment.

In a detailed report dated April 24, 1987, Dr. Eliaser reviewed in detail the evidence of record and concluded in relevant part as follows:

> "The several diagnoses have been established as identified above, including arterial hypertension, diabetes mellitus, transient peptic ulcer and the noncardiac nature of the chest pain.
>
> "None of the above conditions is causally related to the factors of employment as described in the statement of accepted facts by cause, precipitation or acceleration. It is medically rea-

sonable to accept that there was aggravation of the hypertension and peptic ulcer symptoms associated with acute stressful situations in spite of the lack of precise documentation of close correlation. The likelihood of the diabetes mellitus having had any significant aggravation component is remote.

"The aggravation of the arterial hypertension would have ceased as of the time of work termination, August 1981. The peptic ulcer seemingly was resolved as of the demonstrated healing by x-ray on October 27, 1964. It is not unlikely that subsequent evanescent symptoms of gastrointestinal origin might have ensued under stressful or other circumstances. The data did not indicate any specific aggravation of the diabetes mellitus but were there any, [such aggravation] also would have ceased in August 1981. As indicated above there was no permanent aggravation nor change in the course of the underlying disease as a result of any work-related components.

"The nonindustrial and preexisting disabilities pertain to the long-standing arterial hypertension without demonstrable significant cardiovascular complications and would imply a limitation from inordinately strenuous physical activities on a permanent basis. The diabetes, *per se*, would not constitute a significant impairment and the peptic ulcer had apparently receded prior to work termination, therefore requiring no subsequent limitations.

"The claimant will require intensive medical management for the arterial hypertension, especially if a renal component is later demonstrated, and the overall prognosis is somewhat less than favorable in reference to possible ischemic heart disease in presence of hyperpiesia and hyperlipidemia, neither of which was caused by federal employment.

"The data showed no periods of total disability assessable to any work-related condition identifiable from the reviewed records. There were repeated comments regarding the claimant's continuing in his job with various waivers regarding his systemic diseases. The sole period of hospitalization recounted in the attached material involved a diagnostic procedure pertaining to the right kidney, May 11, 1967. The reviewed records do not suggest that the off-work status in 1981 pertained to a deterioration of his physical condition but rather to the [air traffic controllers'] strike."

By letter dated May 7, 1987, the Office informed appellant that it accepted that he sustained a temporary aggravation of his hypertension and peptic ulcer symptoms as a result of his duties as an air traffic controller but that there was a conflict in medical opinion between his physician, Dr. Kim, and the Office medical consultant, Dr. Eliaser, as to whether such aggravation resulted in disability and that in order to resolve such conflict, the Office would refer appellant and his case record to an impartial medical specialist for examination and evaluation.

On May 19, 1987, the Office referred appellant, his case file, together with a statement of accepted facts, to Dr. Edward Chesne, a Board-certified cardiologist, to serve as an impartial medical specialist pursuant to 5 U.S.C. section 8123(a) and to resolve the conflict in medical opinion. Specifically, the Office requested Dr. Chesne to state: whether the diagnoses of hypertension, peptic ulcer and diabetes are established and explain how the findings establish the diagnoses; whether the diagnosed conditions are causally related to factors of appellant's employment; and, if aggravation of any of the conditions by factors of appellant's employment are indicated, to explain whether such aggravation was temporary or permanent and if temporary when such aggravation ceased or is expected to cease, and if permanent, whether any material changes occurred to alter the course of the underlying condition and whether appellant sustained any periods of total disability as a result of his work-related conditions. The Office requested that Dr. Chesne give detailed reasoning of the conclusion reached.

Dr. Chesne examined appellant on June 22, 1987 and in a report dated June 23, 1987, reviewed appellant's medical history, disclosed his findings upon physical examination and concluded as follows:

> "Diagnoses: I. Hypertension, apparently essential in origin, not adequately controlled; there is grade II hypertensive eye changes noted, but no evidence of left ventricular hypertrophy, old stroke, or renal dysfunction; II. Diabetes mellitus, controlled with oral hypoglycemics; III. History of duodenal ulcer, apparently in remission.
>
> "The diagnosis is indeed established; actually three diagnoses have been established. They are listed above.
>
> "The duodenal ulcer has been established by the history, as well as entries in the old chart.
>
> "The diabetes mellitus is established by the history, as well as entries in the records that accompanied the patient.
>
> "It is my understanding of the disease entities mentioned above, namely the hypertension and the ulcer, that both may be adversely affected by stress. There is some information that

> both of these illnesses have been exacerbated by the profession of air traffic controller. I suspect that this may well be the case in regard to [appellant]. However, he has been away from work for five to six years and still has rather impressive hypertension and diabetes that still needs medication for control, in spite of his weight control.
>
> "Hence, it is my opinion that his work may have exacerbated or aggravated his hypertension and possibly even his diabetes mellitus, but not to a great degree, since both illnesses still remain, many years after the stress of his work has been withdrawn from him. I don't believe that his work was a direct cause or precipitant of any of his illness.
>
> "It is my opinion that his work probably did aggravate both hypertension and his diabetes but that such an aggravation must be a temporary one, since the driving force is stress, and this has been removed. Hence, I believe the aggravation has ceased. I doubt that it continues to affect the underlying disease.
>
> "Presently, [appellant] is not totally disabled for any and all types of work. In fact, after reviewing his medical records and the history I've taken, I doubt that he was ever totally disabled for all types of work. However, he apparently was disabled and given a medical waiver from 1966 on, for the work of an air traffic controller. If this is the case, and it appears to be, then the same factors that rendered him totally disabled then, continue to this day."

By compensation order dated August 5, 1987, which incorporated a memorandum summarizing the evidence, the Office reviewed appellant's claim on the merits and vacated, in its entirety, its previous order of January 22, 1986 and accepted that as a result of his federal employment, appellant sustained a temporary aggravation of hypertension and peptic ulcer symptoms which aggravation ceased upon appellant's removal from the workplace on August 2, 1981 and that, therefore, monetary compensation was not payable. The Office found that the weight of the medical evidence rested with the detailed reports of Drs. Eliaser and Chesne who concluded that stressful factors temporarily aggravated appellant's hypertension and peptic ulcer symptoms and ceased once appellant was removed from such stressful environment which occurred on appellant's termination from employment.

The Board finds that the case is not in posture for decision.

The issue of whether factors of appellant's employment caused a temporary or permanent aggravation of his preexisting conditions of hypertension, peptic ulcers and diabetes has not been resolved. Dr. Kim, a Board-certified endocrinologist and appellant's treating physician, stated that stressful factors of appellant's employment permanently aggravated appellant's underlying conditions such that, although appellant is no longer exposed to such stressful factors, he remains disabled for employment as a result of the permanent effects such aggravation had on his underlying conditions. Dr. Eliaser, a Board-certified cardiologist acting as an Office medical consultant, stated that it was his opinion that stressful factors of appellant's employment temporarily aggravated appellant's hypertension and peptic ulcer condition, but that the medical evidence of record did not indicate that such stress had altered the normal course of these conditions thereby resulting in disability and noted that with respect to appellant's peptic ulcer condition, it appeared to be resolved as of October 1964 and that with respect to appellant's diabetes, the medical data did not indicate any aggravation during appellant's employment.

The Office found that a conflict in medical opinion existed between Drs. Kim and Eliaser on the issue of whether aggravation of appellant's hypertension and peptic ulcer by factors of his employment contributed to his disability and in order to resolve this conflict, the Office referred appellant, his case record and a statement of accepted facts to Dr. Chesne, a Board-certified cardiologist, to serve as an impartial medical specialist pursuant to 5 U.S.C. section 8123(a) and provide an impartial medical opinion on whether factors of appellant's employment temporarily or permanently aggravated appellant's underlying conditions of hypertension, peptic ulcers and diabetes and resulted in any periods of total disability.[1] In his report dated June 23, 1987, Dr. Chesne stated that it was his opinion that stressful factors of appellant's employment temporarily aggravated all three of appellant's underlying conditions but that such aggravation ceased when appellant was terminated from his employment.

In situations where a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background must be given special weight.[2] The Board finds that the report of Dr. Chesne is not sufficiently well-rationalized and therefore his report cannot be accorded special weight.

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[1] The Board notes that although the Office, by letter dated May 7, 1987, advised appellant that a conflict in medical opinion existed solely with respect to whether temporary aggravation of his hypertension and peptic ulcer symptoms by his employment, which the Office accepted had occurred, resulted in a disability, the Office requested Dr. Chesne, the impartial medical specialist, to not only render an opinion on the issue of disability but to render an opinion on whether the diagnoses of hypertension, peptic ulcer, and diabetes had been established and whether factors of appellant's employment caused a temporary or permanent aggravation of these conditions.

In finding that stressful factors of appellant's employment did not permanently aggravate appellant's underlying conditions, Dr. Chesne offered as rationale in support of this opinion that appellant has been away from his stressful work environment for five to six years yet still suffers from hypertension and diabetes. Dr. Chesne states: "[S]uch aggravation must be a temporary one, since the driving force is stress, and this has been removed. Hence, I believe the aggravation has ceased. I doubt that it continues to affect the underlying disease." This explanation is inadequate for finding that stressful factors of appellant's employment resulted in a temporary, and not a permanent, aggravation of his underlying conditions. With respect to whether appellant sustained any disability from aggravation of his underlying conditions by factors of his employment, Dr. Chesne stated that: "[A]fter reviewing [appellant's] medical records and the history I've taken, I doubt that he was ever totally disabled for all types of work. However, he apparently was disabled, and given a medical waiver from 1966 on for the work of air traffic controller. If this is the case, and it appears to be, then the same factors that rendered him totally disabled then, continue to this day." This statement is also inadequate for determining whether appellant sustained any disability as a result of aggravation of his underlying conditions by factors of his employment.

In order to determine whether appellant's employment temporarily or permanently aggravated his underlying conditions, and the extent and degree of any disability which may have resulted from such aggravation, a rationalized medical opinion must include a discussion of: the nature of the underlying conditions, their natural or traditional course; how the underlying conditions may have been affected by appellant's employment as determined by medical records covering the period of employment; whether such affects, if any, caused material changes in the underlying conditions; or, if no material changes occurred, would the symptoms or changes indicative of a temporary aggravation have subsided or resolved immediately upon appellant's removal from the stressful employment environment and, if not, at what point would such symptoms or changes have resolved; and whether any aggravation of appellant's underlying conditions caused by factors of his employment caused disability during or subsequent to appellant's employment.

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[2] *James P. Roberts*, 31 ECAB 1010 (1980).

The Board has held that in a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical opinion and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[3] The Board finds that further elaboration of Dr. Chesne's opinion supporting a temporary employment aggravation of appellant's underlying conditions is necessary and, therefore, the Office should secure a supplemental report. The Board also notes that although Dr. Chesne concluded that appellant's employment temporarily aggravated his diabetes, the Office did not accept as an employment-related condition, temporary aggravation of diabetes, and failed to explain the exclusion of this condition in view of the report of the impartial medical specialist.

In the event that Dr. Chesne fails to provide sufficient rationale in support of his opinion, the Office should refer appellant and his case record, together with a statement of accepted facts, to a second impartial specialist for an impartial examination and evaluation and a rationalized medical opinion on the issues in question.[4]

The decision of the Office of Workers' Compensation Programs dated August 5, 1987 is set aside and the case remanded for action consistent with this decision.[5]

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[3] *Harold Travis*, 30 ECAB 1071 (1979).

[4] *James L. Hearn*, 29 ECAB 278 (1978).

[5] The Board notes that appellant submitted on appeal a January 18, 1988 report of Dr. Kim. Under the Board's Rules of Procedure, the Board's review of a case shall be limited to the evidence in the record which was before the Office at the time of its final decision. Therefore, this additional evidence could not be considered by the Board in rendering its decision. *See* 20 C.F.R. section 501.2(c).

In the Matter of GEORGE E. DABDOUB *and* DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Laredo, Tex.

Docket No. 88-602; Submitted on the Record;
Issued May 31, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of an overpayment of compensation in the amount of $26,975.36.

On June 30, 1967, appellant, then a 48-year-old customs inspector, sustained an injury to his right arm while in the performance of duty. Based on the medical evidence submitted by appellant in support of his claim, the Office of Workers' Compensation Programs accepted appellant's claim for "comminuted fracture of proximal end of right ulna." On the basis of additional medical evidence subsequently submitted by appellant, the Office determined that appellant had sustained a 40 percent permanent loss of use of his right arm as a result of his June 1967 employment injury and on September 6, 1968, granted appellant a schedule award for 40 percent permanent loss of use of his right arm.

The record indicates that on September 10, 1970, appellant underwent surgery for "removal of osteophytes and part of the radial head-regenerated in the right elbow." In a postoperative report dated December 28, 1970, appellant's physician, Dr. Gregorio M. Canales, a Board-certified orthopedic surgeon, stated that appellant sustained additional impairment of his right arm. An Office medical adviser reviewed the medical evidence of record and determined that there had been no increase in the percent of impairment to appellant's right arm and by letter dated May 24, 1971, the Office advised appellant of its determination.

By letter dated July 18, 1971, appellant requested a hearing on the Office's finding that he had no increase in impairment. Pursuant to this request, the Office's Branch of Hearings and Review reviewed appellant's case and, in a decision dated October 26, 1971 found that appellant had a 50 percent loss of use of his right arm and that appellant was therefore entitled to a schedule award for an additional 10 percent impairment of his right arm which he received on or about December 13, 1971.

On May 24, 1974, appellant filed a claim for a schedule award alleging increased impairment to his right arm. In support of his claim, appellant submitted the April 22, 1974 report of Dr. Canales who rated appellant's impairment of his right arm due to progressive ankylosis of the right forearm as 75 percent but failed to submit findings upon physical examination of appellant, including measurements with respect to appellant's range of motion of his right arm. An Office medical adviser reviewed the medical evidence of record and determined that appellant had an additional 25 percent increase in impairment of his right upper extremity. On July 10, 1974, appellant was granted a schedule award for an additional 25 percent loss of use of his right arm.

By letter dated April 24, 1986, appellant inquired about an additional schedule award for alleged increased impairment of his right arm and submitted the April 5, 1986 report of Dr. Francisco Mendoza, a Board-certified orthopedic surgeon, who examined appellant on that date, disclosed his findings upon physical examination and found that appellant had a disability rating of 43 percent for his right arm. An Office medical adviser reviewed Dr. Mendoza's report and determined, by application of the AMA *Guides*,[1] that the percentage of appellant's impairment of his right arm was actually equivalent to 45 percent. On June 16, 1987, the Office granted appellant a schedule award for an additional 20 percent loss of use of his right arm. The schedule award stated that appellant had a total of 45 percent loss of use of his arm thereby indicating that appellant had already received, and only received, compensation for 25 percent loss of use of his right arm.

The Office subsequently discovered that appellant had been granted four schedule awards for his right arm which resulted in a total award of compensation for 95 percent loss of use of his right arm. By compensation order dated May 1, 1987, which incorporated a memorandum summarizing the evidence, the Office vacated its order dated July 10, 1974 which awarded appellant compensation for an additional 25 percent loss of use of his right arm, and also vacated its order dated June 10, 1986, which awarded appellant compensation for an additional 20 percent loss of use of his right arm. The Office found that the medical evidence of record did not support that appellant had impairment of his right arm greater than 50 percent. The Office found that it erred in granting appellant the July 10, 1974 schedule award for an additional 25 percent impairment of his right arm based on the April 22, 1974 report of

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[1] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (2nd ed. 1984).

Dr. Canales, who rated appellant's disability at 75 percent, because Dr. Canales submitted no evidence in support of his disability rating nor did the Office request such evidence, thereby failing to follow its own guidelines for determining impairment of a schedule member of the body. The Office found that it also erred in granting appellant the June 10, 1986 schedule award for an additional 20 percent impairment of his arm based on the April 5, 1986 report of Dr. Mendoza who rated appellant's disability at 45 percent because appellant had previously been awarded compensation for 75 percent impairment of his right arm, 30 percent more than that determined by Dr. Mendoza. The Office therefore found that appellant had received an overpayment of compensation and remanded the case for a determination of the amount of the overpayment.

By letter dated June 10, 1987, the Office notified appellant that a preliminary determination had been made that an overpayment of compensation in the amount of $44,961.72 had occurred in his case because he received two schedule awards to which he was not entitled, one on July 10, 1974 in the amount $17,986.36 and one on June 10, 1986 in the amount of $26,975.36. The Office also stated that a preliminary finding had been made and that appellant was without fault in the matter of the overpayment. The Office advised appellant that if he disagreed with the amount of the overpayment or that the overpayment had in fact occurred, he had the right to submit evidence in support of his contention. The Office also advised appellant that the Federal Employees' Compensation Act [2] provides that the Office may not recover an overpayment from a claimant who is found to be without fault if it is shown that recovery would defeat the purpose of the Act or would be against equity and good conscience. The Office stated that the purpose of the Act is to provide at least a subsistence income for beneficiaries and that, therefore, information concerning appellant's income and expenses was important in order to determine whether or not waiver or recovery of the overpayment was proper in his case. In this regard, the Office included with its June 10, 1987 letter an overpayment recovery questionnaire (Form OWCP-20) for appellant to complete. The Office concluded its letter stating that appellant must submit a reply within 30 days from the date of the letter or a final determination would be made based on the evidence then of record.

By reply received June 18, 1987, appellant requested that recovery of the $44,961.72 overpayment be waived and submitted a completed Form OWCP-20 which indicated that he had total monthly income of $1,596.75, total monthly expenses of $1,370.00 and assets of $35,315, of which $35,000 consisted of savings in an IRA account.

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[2] 5 U.S.C. section 8101 *et seq.*

By letter decision dated June 23, 1987, the Office found that an overpayment of compensation in the amount of $44,961.72 occurred in appellant's case because appellant received two schedule awards to which he was not entitled. The Office also found that appellant was not at fault in the matter of the overpayment. The Office further found, after careful consideration of appellant's financial situation based on the information submitted by appellant, that his case did not warrant waiver of recovery of the overpayment and required that appellant repay the overpayment in the lump sum amount of $44,961.72 within 30 days from the date of the decision.

By letter dated June 28, 1987, appellant requested a hearing on the matter of the overpayment.

By compensation order dated July 28, 1987, which incorporated a memorandum summarizing the evidence, the Director of the Office, based on the findings and recommendations of an Office hearing representative, as set forth in the memorandum, vacated the decisions of the Office dated May 1, 1987, June 10, 1987 and June 23, 1987. The Office hearing representative found that appellant's case was not in posture for a hearing and that further development of the evidence was necessary to determine the extent and degree of appellant's injury-related disability. The Office hearing representative found that appellant was entitled to compensation for 75 percent permanent loss of use of his right arm; that in 1974 an Office medical adviser reviewed the medical evidence of record and determined that appellant was entitled to compensation for 75 percent loss of use of his right arm. The Office hearing representative concluded that appellant may have only received one schedule award to which he was not entitled, the award dated June 10, 1986 which was for an additional 20 percent impairment of his right arm. The Office hearing representative stated that before an overpayment was declared, appellant should be further examined to determine if he "retains any 'industrial use' of his right arm." The Office hearing representative remanded the case for referral of appellant to an appropriate medical specialist for a disability examination and following such examination, to proceed with a determination as to whether an overpayment exists.

In accordance with the instructions of the Office hearing representative, the Office referred appellant, his case file, together with a statement of accepted facts, to Dr. Robert L. Jones, a Board-certified orthopedic surgeon, for examination and an opinion on the extent and degree of appellant's employment-related impairment of his right arm. Dr. Jones examined appellant on September 24, 1987 and in a report of the same date disclosed his findings upon physical examination of appellant, including measurements with respect to appellant's range of motion and determined, through application of the AMA *Guides*, that appellant had a 44 percent permanent impairment of his right arm. On October 5, 1987, Dr. Jones included with his report a work restriction evaluation form setting forth appellant's work tolerance limitations. On October 5, 1987 an Office medical adviser reviewed Dr. Jones report and determined that appellant has a 45 percent permanent impairment of his right arm.

On the basis of this report, the Office determined that appellant did not have more than a 75 percent impairment of his right arm for which he had been compensated and, therefore, the June 10, 1986 schedule award for an additional 20 percent impairment of his right arm, which increased appellant's compensation for his right arm to 95 percent, constituted an overpayment.

By letter dated November 5, 1987, the Office notified appellant that a preliminary determination had been made that an overpayment of compensation in the amount of $26,975.36 had occurred in his case because he had inadvertently been paid a schedule award for an additional 20 percent loss of use of his right arm to which he was not entitled. The Office also stated that a preliminary finding had been made that appellant was without fault in the matter of the overpayment. The Office advised appellant that if he disagreed with the amount of the overpayment or that the overpayment had in fact occurred, he had the right to submit evidence in support of his contention. The Office informed appellant, as it had in its earlier letter of June 10, 1987, of the provision of the Federal Employees' Compensation Act pertaining to recovery of an overpayment where a claimant is found to be without fault and requested that appellant submit a completed Form OWCP-20, with supporting documentation, in order that the Office may determine whether or not recovery of the overpayment was appropriate in his case.

By letter dated November 13, 1987, appellant requested a waiver of the overpayment and informed the Office that he had previously completed and submitted Form OWCP-20 in June 1987. By letter dated November 23, 1987, the Office advised appellant that his June 1987 Form OWCP was not sufficiently detailed such that the Office could properly evaluate his financial situation and requested that appellant submit detailed financial information. The Office allowed appellant an additional 20 days from the date of its letter to submit such information. The record indicates that appellant did not submit such additional information.

By letter decision dated December 17, 1987, which incorporated a memorandum summarizing the evidence, the Office found that an overpayment of compensation in the amount of $26,975.36 occurred in appellant's case because, by schedule award dated June 10, 1986, he was paid compensation for an additional 20 percent for loss of use of his right arm to which he was not entitled. The Office found that appellant was without fault in the matter of the overpayment. The Office further found that, after careful consideration of his financial situation based on the information of record, the circumstances of appellant's case did not warrant waiver of recovery of the overpayment. The Office noted in its decision that appellant was advised by letter dated November 23, 1987 that the financial information he submitted in June 1987 was not sufficient to support a waiver of recovery of the overpayment and that he was requested to submit additional evidence but failed to do so. The Office required that appellant repay the overpayment in the lump sum amount of $26,975.36 within 30 days from the date of the December 17, 1987 letter decision.

The Board finds that the Office of Workers' Compensation Programs did not abuse its discretion by refusing to waive recovery of an overpayment of compensation in the amount of $26,975.36.

Appellant does not dispute that an overpayment occurred nor does he dispute the amount of the overpayment but contends that he is not at fault in the matter of the overpayment. The issue of fault, however, is not in dispute in this case. The Office of Workers' Compensation Programs found that appellant was without fault, or not at fault, in the matter of the overpayment. Accordingly, the only issue to be addressed is whether recovery of the overpayment from appellant should be waived because recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.

The fact that an appellant is without fault, or not at fault, in the matter of an overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets tests set forth as follows in section 8129(b):

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." [3]

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under 5 U.S.C. section 8129(b), section 10.322(a) of Title 20 of the Code of Federal Regulations provides as follows:

> "(a) General. Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:
>
> > "(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and
> >
> > "(2) The individual's assets do not exceed the resource base of $3,000 for an individual or $5,000 for an individual with a spouse or one dependent plus $600 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment in paragraph (d) of this section. The first $3,000 or more depending on the number of the claimant's dependents is also exempted from recoupment." [4]

In *Robert E. Wenholz*,[5] the Board found that the guidelines for recovery of an overpayment from an individual who is without fault, as set forth in section 10.322(a)(1) and (2),[6] were meant to be read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income[7] to meet his current ordinary and necessary living expenses[8] and also that his assets,[9] those which are not exempted, do not exceed a resource base of $3,000 (or, alternatively, $5,000 with a spouse or with one dependent, plus $600 for each additional dependent).

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[3] 5 U.S.C. section 8129(b).

[4] 20 C.F.R. 10.322(a) (added April 1, 1987). Assets which are exempted from recoupment are set forth in 20 C.F.R. section 10.322(d) include: "the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile, or income producing property if the income from such property has been included in comparing income and expenses."

[5] 38 ECAB 311 (1986).

[6] Prior to April 1, 1987, these guidelines were set forth only in Chapter 2-901.4(b)(1) of the Federal (FECA) Procedure Manual. On April 1, 1987, sections 10.320 through 10.324 pertaining to overpayments were added to the Office's regulations as set forth in Title 20, Part 10 of the Code of Federal Regulations and became effective June 1, 1987.

In the instant case, appellant submitted, in response to the Office's June 10, 1987 preliminary finding of a $44,961.72 overpayment, financial data which lists his total monthly expenses as $1,370.00, his total monthly income as $1,596.75 and his total assets as $35,315.00. However, following the vacation of the June 10, 1987 overpayment finding and its replacement with the Office's November 5, 1987 finding that an overpayment in the amount of $26,975.36, had occurred, appellant did not submit further financial data although he was twice requested to do so by the Office.

The Board finds that the financial data provided to the Office by appellant in June 1987 establishes that appellant has sufficient monthly income to meet his ordinary and necessary living expenses and has sufficient assets to enable him to make a full lump sum repayment of the overpayment without causing a decrease in his resource base below $5,000. Therefore, under the circumstances of appellant's case, refusal to waive the overpayment would not "defeat the purpose of the Act."

To determine whether recovery of the overpayment is against equity and good conscience, the second test under 5 U.S.C. section 8129(b), section 10.323 of Title 20 of the Code of Federal Regulations provides as follows:

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[7] 20 C.F.R. section 10.322(b) states that an individual's "income" includes: "any funds which may be reasonably considered available for his or her use, regardless of the source. Income to a spouse will not be considered available to the individual unless the spouse was living in the household both at the time the overpayment was incurred and at the time waiver is considered. Types of income include but are not limited to: (1) government benefits such as Black Lung, Social Security and Unemployment Compensation benefits; (2) wages and self-employment; (3) regular payments such as rents or pensions; and (4) investment income."

[8] 20 C.F.R. section 10.322(c) states that "ordinary and necessary living expenses" include: "(1) fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, transportation (e.g. life, accident and health insurance); (2) medical hospitalization, and other similar expenses; (3) expenses for the support of others for whom the individual is responsible; (4) church and charitable contributions made on a regular basis (This shall not include large one-time gifts made after receipt of the preliminary notice of overpayment); and (5) miscellaneous expenses (e.g., newspaper, haircuts) not to exceed $25.00 per month."

[9] 20 C.F.R. section 10.322(d) states that an individual's "assets" include: (1) Liquid Assets cash on hand, the value of stocks, bonds, savings account, mutual funds and the like; (2) Non-Liquid Assets—the fair market value of property such as a camper, second home, extra automobile, jewelry, etc.

> "(a) Recovery of an overpayment is considered to be 'against equity and good conscience' when an individual presently or formerly entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria to be applied in determining severe financial hardship are the same as in section 10.322.
>
> "(b) Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered. To establish that a valuable right has been relinquished, it must be shown that the right was in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss. An example of such 'detrimental reliance' would be a decision to enroll in college based on the award of benefits. The funds have been spent and cannot be recovered nor can the purchase be liquidated." [10]

In the present case, appellant has not alleged and the evidence of record does not establish that he would experience severe financial hardship in attempting to repay the overpayment or that, in reliance upon the overpayment, appellant relinquished a valuable right or changed his position for the worse and, therefore, the Office did not abuse its discretion by refusing to waive recovery of the overpayment under the second test of 5 U.S.C. section 8129(b).

The only information regarding appellant's financial situation and his ability, or lack thereof, to repay the overpayment was that contained on Form OWCP-20 submitted by appellant in June 1987. The June 1987 financial information does not support appellant's request that a waiver of overpayment be granted. The record indicates that on two occasions the Office requested appellant to submit detailed financial information in support of his request for waiver but he failed to do so.[11] Although appellant was found to be

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[10] 20 C.F.R. section 10.323.

[11] The Board notes that although appellant, by letter dated July 12, 1987 contested his financial ability to repay the $44,961.72 overpayment initially declared by the Office in its June 23, 1987 decision (which was subsequently vacated), appellant, other than claiming he is not at fault and that the December 17, 1987 decision is

Continued

without fault in the matter of the overpayment, he nevertheless bears the responsibility of providing the requisite financial information to support the granting of a waiver. In this regard, section 10.324 of Title 20 of the Code of Federal Regulations states as follows:

> "In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information described in section 10.322, *as well as such additional information as the Office may require to make a decision with respect to waiver.* Failure to furnish the information within 30 days of request shall result in denial of waiver, and no further requests for waiver shall be entertained until such time as the requested information is furnished." [12] (emphasis added)

The Board finds that the Office, based on the financial information submitted by appellant and following the guidelines for recovery of an overpayment as set forth in the Code of Federal Regulations, gave careful consideration to appellant's financial situation and properly determined that waiver of recovery of the overpayment was not warranted in his case and that appellant was capable of making full and immediate repayment of the overpayment.[13]

The December 17, 1987 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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unfair, has not disputed his ability to repay the overpayment. The Board notes that the emphasis of appellant's objections in his July 12, 1987 letter was that the Office in requiring repayment did not take into consideration emergency expenses, fluctuations in usual expenses, home repairs and vacation. Appellant, however, failed to submit any supporting documentation.

[12] 20 C.F.R. section 10.324 (added April 1, 1987).

[13] The Board notes that on appeal, appellant has alleged additional impairment of his right arm. Appellant's appropriate course with respect to such allegation is to submit to the Office a claim with supporting medical evidence.

In the Matter of SHIRLOYN J. HOLMES *and* U.S. POSTAL SERVICE, POST OFFICE, Charlottesville, Va.

Docket No. 87-1031; Hearing February 10, 1988;
Issued May 31, 1988

Appearances: *James G. MacQueen, Esq.*, for appellant; *LuAnn B. Kressley, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's disability beginning June 7, 1985 is causally related to her May 21, 1984 employment injury.

On May 21, 1984 appellant, then a 26-year-old distribution clerk, filed a claim for a strained muscle in her right shoulder sustained on May 21, 1984 by lifting a sack of mail. Appellant stopped work on May 21, 1984 and returned to her regular work on May 30, 1984. She received continuation of pay during this absence from work.

Appellant was seen in a hospital emergency room on May 21, 1984 by Dr. Tom Kuhlmann, a Board-certified internist, and Dr. Lloyd Gibson, a general surgeon. Swelling and tenderness were found on examination, a right shoulder strain was diagnosed, a sling was prescribed, and appellant was advised to return to work on May 24, 1984. On May 24, 1984 appellant was examined by Dr. Gwo-Jaw Wang, a Board-certified orthopedic surgeon, who stated she could return to regular work on May 28, 1984.

On October 15, 1984 appellant again stopped work; she later filed a claim for a recurrence of disability beginning this date.

In an October 16, 1984 report Dr. Martha Daly, a specialist in emergency medicine, noted tenderness and slight palpable edema of the biceps tendon at the right shoulder, diagnosed biceps tendinitis, and stated appellant could do no work until rechecked that weekend.

On October 20, 1984 appellant was examined by Dr. John Rogers, an associate of Dr. Daly. Dr. Rogers diagnosed improved tendinitis and indicated appellant could return to work the following Monday. In an October 24, 1984 report Dr. Rogers stated appellant was unable to work due to pain in her shoulder; the doctor diagnosed tendinitis and injected a trigger point in her right shoulder. On October 30, 1984 Dr. Rogers again examined appellant and stated she was not much better, that she could do light work, and that he had referred her to Dr. Michael Kovac, a Board-certified orthopedic surgeon.

In a November 5, 1984 report Dr. Kovac stated that examination that date revealed "a reproducible popping-grinding sound and sensation which is uncomfortable" on movement of the shoulder and some subacromial tenderness. Dr. Kovac diagnosed "Probable subacromial bursitis and/or tendinitis of the rotator cuff," and stated that appellant could perform light duty with no lifting or strenuous use of the right upper extremity and that based on the history and examination he thought "the present symptoms are indeed due to the 31 May 84 work-related injury." Dr. Kovac had an arthrogram of appellant's right shoulder performed, which showed no evidence of rotator cuff tear or other abnormality. In a November 9, 1984 report Dr. Kovac noted crepitance on motion, diagnosed "rotator cuff strain with subacromial bursitis and/or tendinitis rotator cuff, right shoulder, work related," and stated that he had injected her right shoulder and that she could perform only light work and should use her sling as much as possible.

Appellant returned to light duty on November 7, 1984. The Office of Workers' Compensation Programs determined she was entitled to continuation of pay from October 15, 1984 to November 7, 1984.

Appellant again stopped work on June 7, 1985; she claimed compensation from this date until she returned to work on September 11, 1985.

Appellant submitted an August 26, 1985 report on an Office form from Dr. Frank C. McCue, a Board-certified orthopedic surgeon, who had first examined her on May 22, 1985. Dr. McCue listed a history of lifting a 65-pound sack of mail on May 21, 1984, diagnosed bicipital tendinitis and impingement syndrome, indicated by checking a box on the form that the condition was related to the history of injury, stated that right shoulder arthroscopy had been performed on July 12, 1985, and indicated appellant was disabled from June 3, 1985 to September 9, 1985.

In a September 13, 1985 letter the employing establishment advised the Office that appellant had been assigned light duty on November 7, 1984, that she was returned to regular duty casing mail on November 20, 1984, and that she was again assigned light duty on February 8, 1985, all in accordance with reports from Dr. Kovac.

By an October 3, 1985 letter the Office advised appellant that it needed her statements describing her condition since November 20, 1984, and a detailed medical narrative including the physician's rationale on the relation of her recurrence of disability to her May 21, 1984 injury.

On March 4, 1986 an Office medical adviser reviewed the medical evidence and stated that it showed she was fit for duty on May 28, 1984 and that there was no supportive report on her disability beginning June 6, 1985.

By a compensation order dated March 6, 1986 the Office found that appellant failed to meet her burden of proof to establish her disability from June 7, 1985 to September 11, 1985 was causally related to her May 21, 1984 employment injury.

Appellant requested reconsideration, and submitted a June 4, 1985 report from Dr. McCue stating that appellant's "main problem is the disability of using this major arm with an aching pain, some anterior pain present on anterior flexion," that the negative arthrogram generally ruled out rotator cuff tears of any significance, and that "it appears that her main problem is not in the shoulder joint itself with the tenderness about the anterior shoulder and also over the coracoid process."

Appellant submitted Dr. Kovac's notes from three visits from February 8, 1985 to April 17, 1985. On February 8, 1985, Dr. Kovac injected appellant's right shoulder and imposed limitations on lifting and working above the shoulder. On April 3, 1985 Dr. Kovac noted that appellant had missed three and one-half days of work at the end of March because of worsening shoulder pain. On April 17, 1985 Dr. Kovac stated appellant's limitations remained the same and that surgery on her right shoulder was scheduled for June 4, 1985.

In a May 24, 1985 report Dr. Kovac stated that surgery was planned and that "the expected outcome is relief or at least marked reduction in right shoulder pain and decrease in the painful rubbing sensation which is now present when patient moves the right shoulder through a full range of motion."

Also submitted were notes regarding physical therapy for appellant's right shoulder from August 2 to September 30, 1985 and from January 9 to March 20, 1986, and notes from a pain management center from January 9, 1986 to February 24, 1986 describing treatment for a frozen shoulder, and for a tremor of the right arm which occurred after several intrabursal injections.

In a March 28, 1986 report Dr. Ken Oswalt, an anesthesiologist at the pain management center, diagnosed chronic bursitis of the right shoulder and a movement disorder of the right arm. In an August 13, 1986 report Dr. John C. Rowlingson, a Board-certified anesthesiologist and director of the pain management center, stated that "The record reveals that the complaint for which we were treating her started in May of 1984 when she was lifting a 65-pound sack of mail onto a truck," and that the etiology of her right shoulder muscle tremor problem had "not been exactly determined, even after formal neurology consultation and follow-up, yet it seems related to the physical therapy and nerve blocks that were ongoing when it was first noted." Dr. Rowlingson stated:

> "Thus, I have no trouble with the concept that Ms. Holmes' current problems with right shoulder pain are related to the

> original injury. I do not have official documentation of that, but this should be sought from Drs. Kovac and McCue. The fact that Dr. McCue found no explanation for her pain during arthroscopic surgery simply means no pathology was found in the shoulder joint. But, musculoskeletal causes/consequences of shoulder pain do not necessarily produce positive findings at surgery, so clarification of what the negative surgical findings mean should be sought from Dr. McCue. Ms. Holmes' current problems with shoulder muscle tremor are certainly real and seem to be unexpected consequences of therapy aimed at decreasing her shoulder pain.
>
> "Dr. McCue's input in this case would seem to be the most crucial, as he needs to state that the pain he operated on this patient for was related to her 5/84 injury. Thereafter, the treatment here is related as a conservative attempt to manage her complaints after surgical intervention was of no avail."

In a September 8, 1986 report Dr. McCue stated:

> "She had a history of injury while lifting a heavy sack on the job in May 1984 with pain in the right shoulder. She was seen by Dr. Kovac with the diagnosis of post-traumatic bursitis and rotator cuff injury and was seen for second opinion by me on May 22, 1985. I think you do have a letter after this evaluation. Because of the continued problem with the shoulder, on July 12 1985, an arthroscopy of the shoulder was carried out, and this particular procedure showed the findings on the interior of the joint. The fact that this was found to be negative certainly did not suggest in any way that there was no pathology present in the shoulder area.
>
> "In fact, the involvement of the bursa and the biceps tendon and other extraarticular problems about the shoulder would not be visualized in any case.
>
> "She has had other consultations since that time, and she has also been seen in the Pain Clinic. I feel that she certainly has a real problem in the right shoulder and upper extremity. The fact that there was a negative arthroscopy would not detract from this whatsoever, and it did occur following the injury on May 21, 1984."

At a hearing held before an Office hearing representative on September 29, 1986 appellant testified that she had no problems with her right shoulder or arm before May 21, 1984, that she missed a lot of time from work because of her right shoulder problem from November 8, 1984 to May 1985, and that she still had right arm and shoulder pain.

In an October 7, 1986 report Dr. McCue stated:

> "I do think that Ms. Holmes does have impingement of the shoulder, probably due to the involvement of the rotator cuff.
>
> "This may be caused by many things, but certainly, lifting causing stress on the rotator cuff of the shoulder and particularly if done in a repetitious nature or a sudden heavy lift could cause the swelling with secondary impingement in the confined space between the rotator cuff and the acromion and coracoacromial ligamentous arch which the humeral head with the rotator cuff lying on top of it rotates and impinges, particularly with motion, as the arm is moved in different positions."

By a decision dated January 13, 1987 and made final on January 20, 1987 an Office hearing representative found that appellant had failed to meet her burden of proof, stating that Dr. McCue's opinion on causal relation was speculative and vague.

The Board finds that appellant has established that her disability beginning June 7, 1985 is causally related to her May 21, 1984 employment injury.

Appellant's injury sustained on May 21, 1984 by lifting a sack of mail was initially diagnosed as a right shoulder strain, and she returned to work a week after the injury. Appellant again stopped work on October 15, 1984, and was examined by Drs. Daly and Rogers who both diagnosed tendinitis in October 16 and 20, 1984 reports. Dr. Rogers injected a trigger point in appellant's right shoulder on October 24, 1984 but she was not much better by October 30, 1984, whereupon he referred her to Dr. Kovac, a Board-certified orthopedic surgeon. In November 5 and 9, 1984 reports, Dr. Kovac diagnosed bursitis and/or tendinitis of the right shoulder, and indicated her shoulder condition was related to her May 1984 employment injury and that she could perform only light duty.

The Office accepted that appellant's recurrence of disability from October 15, 1984 to November 7, 1984, when she returned to light duty, was related to her May 21, 1984 employment injury.

Thereafter appellant continued to be treated by Dr. Kovac, who injected her right shoulder on February 8, 1985, and imposed work tolerance limitations on that date which resulted in her return to light duty at the employing establishment. In April 1985 Dr. Kovac noted worsening shoulder pain and scheduled surgery on her shoulder. Arthroscopic surgery was performed on appellant's right shoulder on July 12, 1985 by Dr. McCue, another Board-certified orthopedic surgeon, who first examined appellant on May 22, 1985. Dr. McCue diagnosed tendinitis and impingement syndrome, and his reports reflect an accurate history of appellant's May 21, 1984 employment injury. In an August 26, 1985 report Dr. McCue indicated appellant's condition of her shoulder was related to her May 21, 1984 injury, and that she was disabled from June 3, 1985 to September 9, 1985. In a September 8, 1986 report Dr. McCue stated that the fact that the July 12, 1985 arthrogram was negative did not suggest there was no pathology in the shoulder area. In an October 7, 1986 report Dr. McCue explained the mechanism by which repetitious lifting or a sudden heavy lift could cause the impingement syndrome found in appellant's shoulder. Dr. Rowlingson, who treated appellant at a pain management center beginning January 1986, stated that he had "no trouble with the concept that Ms. Holmes' current problems with right shoulder pain are related to the original injury," but deferred to Dr. McCue's opinion.

The Board points out the following well-established principle concerning the interpretation of medical evidence:

> ". . . a compensation award may not be based upon speculation, surmise or conjecture; or stated differently, the award must be based upon evidence, and where an inference, deduction or conclusion is drawn, there must be evidence to support such inference, deduction or conclusion. The evidence required, however, is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical. It is not necessary that the evidence be so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist." [1]

The reports from Dr. McCue contain an accurate history of appellant's employment injury, the same initial diagnosis of tendinitis as those reports on which the Office accepted appellant's recurrence of disability from October 15 to November 7, 1984, and Dr. McCue's opinion that appellant was disabled from June 3, 1985 to September 9, 1985 due to her May 21, 1984 employment injury. The Board recognizes that the reports of Dr. McCue and the other physicians who treated appellant offer little rationale in support of causal relation. However, given the continual course of unsuccessful treatment for right shoulder problems,[2] appellant's uncontradicted testimony that she had no shoulder problems before the May 21, 1984 injury, the absence of medical evidence negating causal relation,[3] and the principles set forth above, the Board finds that the evidence, considered as a whole, is sufficient to lead to a sound, rational and logical conclusion that appellant's disability from June 7, 1985 to September 11, 1985 is causally related to her May 21, 1984 employment injury.[4]

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[1] *Laura Garcia*, 32 ECAB 1336 (1981); *Sherwood R. McCartney*, 9 ECAB 129 (1956); *Elizabeth Maypother*, 5 ECAB 604 at 607 (1953).

The decision of the Office of Workers' Compensation Programs dated January 13, 1987 is reversed and the case remanded to the Office for payment of appropriate compensation benefits for the period from June 7, 1985 to September 11, 1985.

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[2] *See Richard McBride*, 37 ECAB 748 (1986). (The Board found that the employee's treating physician's reports were sufficient to establish causal relation of his recurrences of disability when "read in conjunction with the medical evidence of bridging knee symptoms . . . .")

[3] An Office medical adviser's comments on a March 4, 1986 review of the medical evidence addressed the sufficiency of this evidence rather than specifically negative causal relation of appellant's disability beginning June 7, 1985.

[4] The Board's conclusion is consistent with the principle in the Office procedure manual that no individual factor, such as rationale, standing alone is necessarily determinative of the weight of medical evidence. Federal (FECA) Procedure Manual, Chapter 2-810, Developing and Evaluating Medical Evidence, para. 4 (August 1984).

In the Matter of JESSIE JOHNSON, JR. *and* DEPARTMENT OF THE AIR FORCE, HEADQUARTERS OF THE 440TH TACTICAL AIRLIFT WING, Milwaukee, Wisc.

Docket No. 88-707; Submitted on the Record;
Issued May 31, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has met his burden of proof in establishing that his disability for work on or after May 11, 1982 is causally related to a September 10, 1979 employment injury.

On September 10, 1979 appellant, then a 48-year-old motor vehicle operator, sustained an injury to his right leg and left arm while in the performance of his federal employment. Appellant was hospitalized at St. Joseph's Hospital from September 10, 1979 until September 12, 1979. At the time of his admission, Dr. James Van Heest, a Board-certified general surgeon performed an examination and diagnosed multiple contusions of the right thigh, abdominal wall and left arm. On October 11, 1979 appellant began medical treatment with Dr. William Laney, a Board-certified orthopedic surgeon. On November 12, 1979 Dr. Laney performed an arthroscopy and arthrotomy for a torn anterior cruciate ligament and a small tear of the medial meniscus of appellant's right knee.

On December 18, 1979 the Office of Workers' Compensation Programs accepted appellant's claim for torn anterior cruciate ligament and tear of posterior horn of the medial meniscus, right leg. Appellant received disability compensation benefits for intermittent periods of time through February 15, 1980. Appellant returned to full-time light-duty work on February 18, 1980, and did such duty for a month at which time she was released to regular work on March 17, 1980.

Based on medical evidence submitted by Dr. Laney the Office, on June 4, 1980 issued appellant a schedule award for a 10 percent permanent loss of use of the right leg.

On May 11, 1982 appellant filed a notice of recurrence of disability alleging that he had stopped work on that day and had sought medical treatment due to his September 10, 1979 injury. On the claim form appellant's supervisor supported appellant's claimed recurrence stating that appellant had performed his duties as an equipment operator until it had become too painful for him to perform his duties. The supervisor also noted that from June 1981 until August 1981 appellant had operated a front-end loader which required continual movement of hand and foot controls, which "may have caused or contributed to his recurrence," and that during May of 1982 appellant had operated a farm tractor, at which time the "strain and pain to his right knee was so great that his doctor stated he [could] no longer perform his duties as equipment operator."

In support of his claim of recurrence, on May 25, 1982 appellant submitted a medical report from Dr. Laney, dated May 13, 1982. Dr. Laney reported that appellant was having more leg symptoms, and further stated that "he has developed increasing weakness of both quadriceps and he now has obvious atrophy of both quadriceps. He is also developing some numbness in the index finger of both hands and some grasp weakness."

On June 29, 1982 Dr. Laney reported that appellant's diagnosis was progressive myopathy of unknown etiology. He stated that appellant was totally and permanently disabled; however Dr. Laney noted that the progressive muscular weakness was unrelated to appellant's "on-the-job" injury of September 10, 1979. He also indicated that the September 10, 1979 employment injury resulted in a 10 percent permanent partial disability of appellant's right knee.

By letter dated July 30, 1982 the Office advised appellant that additional medical evidence was necessary to establish a causal relationship between his current disabling right leg condition and the September 10, 1979 injury.

On August 18, 1982 Dr. Laney reported:

> "Jessie Johnson was given a 10 percent permanent partial disability at the knee as a basis of his industrial injury in 1979. His present diagnosis of progressive myopathy is in no way related to that industrial injury."

On August 26, 1982, Dr. R. Clarke Danforth, a Board-certified neurologist reported as follows:

> "I have seen Mr. Jessie Johnson for neurologic evaluation, initially on May 12, 1982. . . . Studies at the time of that hospitalization include abnormal Electromyogram, showing myopathic changes in muscles of all extremities and an abnormal muscle biopsy, compatible with a myopathy with some mild inflammatory component.
>
> "I saw Mr. Jessie Johnson in my office on June 24, 1982. At this time, I discussed the situation with him and his wife and informed them of the diagnosis of limb girdle Dystrophy, with inflammatory component. . . . This muscular condition from which Mr. Johnson suffers is unrelated to his leg injury. It is disabling and at the present time I consider Mr. Johnson to be totally, permanently disabled. Prognosis for significant improvement is poor, but hopefully progression of the condition can be stemmed with treatment."

On October 1, 1982 the Office medical adviser reviewed the case record and reported that appellant had a serious disabling limb girdle dystrophy, which was nonwork-related.

By compensation order dated November 5, 1982, the Office found that the medical evidence failed to establish that appellant's disability on or after May 11, 1982 was causally related to his September 10, 1979 injury.

On December 22, 1982, appellant submitted a medical report from Dr. Laney which reported as follows:

> "I reexamined Jessie Johnson December 13, 1982. His present diagnosis of progressive myopathy has aggravated the original industrial injury of September 10, 1979, to his right knee. Mr. Johnson now has to wear a leg brace at all times. Because of

> this aggravation, I would now rate Mr. Johnson 50 percent permanent disability to his right knee."

On March 24, 1983 Dr. Laney reported as follows:

> "Mr. Johnson's on-the-job injury of September 10, 1979 resulted in some ligamentous laxity in this right knee. It was imperative that he have a strong quadriceps muscle in order to control the frequent giving-way episodes which he has experienced since his injury.
>
> "The progressive myopathy that he has now developed has aggravated his work-related injury by weakening his quadriceps muscle and making his giving-way episodes much more frequent. For that reason his present condition is definitely aggravating his work-related condition."

Appellant was examined on March 31, 1986 by Dr. J. A. Rydlewicz, a Board-certified orthopedic surgeon, who reported on May 9, 1986:

> "On physical exam, the thigh circumference was equal bilaterally. The patient had a typical shuffling and waddling type gait secondary to marked weakness of the pelvic girdle musculature. . . . He has a positive Lachman's sign and positive anterior drawer signs and probable medial rotary instability. There was a +2 medial collateral instability. There was no effusion and no patellofemoral tenderness.
>
> "Impression:
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> 1. Anterior cruciate and medial collateral instability of the right knee.
> 2. Post-status arthrotomy with medial meniscectomy by history.
> 3. Early degenerative joint disease of the medial femoral condyle.
>
> "It is my opinion the patient has a limb girdle myopathy which is superimposed upon his injury of September of 1979. It has now rendered Mr. Johnson permanently and totally disabled, although the original injury did not cause the limb girdle disease. It appears however, that the disease has aggravated his work-related injury, to a point where there is so

> much instability about the knee now, that he is unable to work and is permanently disabled."

On September 16, 1986, appellant requested reconsideration of the November 5, 1982 compensation order.

On October 16, 1986 the Office medical adviser reported that appellant's right knee condition of medial meniscectomy with medial compartment degenerative osteoarthritis, and anterior cruciate with medial collateral instability, was causally related to his employment injury of September 10, 1979. The medical adviser noted however that the 1982 recurrence was caused by the development of limb girdle dystrophy, which was not causally related to the accepted employment injury. The medical adviser also noted that appellant was totally disabled due to the nonwork-related limb girdle dystrophy.

By compensation order dated November 12, 1986 the Office denied modification of the November 5, 1982 decision, finding that the medical evidence failed to establish a causal relationship between appellant's disability commencing May 11, 1982 and the September 10, 1979 injury.

On November 21, 1986, appellant requested a hearing before an Office hearing representative. A hearing was held before an Office hearing representative on November 16, 1987. By decision dated January 11, 1988, the Office hearing representative found that the medical evidence did not support that appellant's limb girdle dystrophy had in any way worsened or aggravated the impairment due to his work injury but had been superimposed on the 1979 injury. For this reason there was no basis for payment of compensation after May 11, 1982 or a further schedule award.

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability on or after May 11, 1982, causally related to his September 10, 1979 employment injury.

Where appellant claims a recurrence of disability to an accepted employment-related injury he has the burden of establishing by the weight of the reliable and probative evidence that the recurrence of the disabling condition for which he seeks compensation was causally related to the accepted employment injury.[1] As part of this burden, appellant must submit rationalized medical opinion evidence based on a complete and accurate, factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related injury.[2]

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[1] *See Henry L. Kent*, 34 ECAB 361 (1982); *Dennis E. Twardzik*, 34 ECAB 536 (1983).

The Board has also stated:

> "[W]here there is no direct relation between an employment-related injury and a subsequent nonemployment injury, the second injury is an independent, intervening incident and is not compensable; on the other hand, where the second injury is sustained as a consequence of an impairment residual to the employment injury, the second injury is deemed, because of the claim of causation, to arise out of and to be in the course of employment and is compensable."[3]

In the instant case, appellant sustained an employment-related injury to his right knee on September 10, 1979 which the Office accepted for the conditions of torn anterior cruciate ligament and tear of the posterior horn of the medial meniscus of the right leg. Appellant received compensation benefits intermittently until February 5, 1980, and was awarded a 10 percent schedule award for loss of use of his right leg. Appellant stopped work on May 11, 1982 and filed a claim of recurrence.

On June 29, 1982 and August 18, 1982, Dr. Laney, appellant's treating physician, reported that appellant was diagnosed as having a progressive myopathy, of unknown origin, unrelated to the employment injury of September 10, 1979. On August 26, 1982 Dr. Danforth diagnosed appellant's progressive myopathy condition as "limb girdle dystrophy; however, he noted that the muscular condition was unrelated to appellant's employment-related leg injury. On October 1, 1982 the Office medical adviser reviewed the case record and reported that appellant had a serious disabling limb girdle dystrophy, which was nonwork related. Dr. Rydlewicz stated on May 9, 1986 that appellant's limb girdle myopathy was superimposed on the injury of September 10, 1979 and that the dystrophy condition aggravated appellant's prior work-related injury.

The medical evidence of record establishes that appellant's limb girdle dystrophy condition is a separate independent condition and unrelated to the employment injury sustained on September 10, 1979. Appellant's attending physician noted that appellant's disability for work commencing May 11, 1982 was due to his progressive muscular weakness, diagnosed as limb girdle dystrophy, which was not related to the traumatic injury appellant sustained to his right leg on September 10, 1979. The medical evidence establishes that the employment injury of September 10, 1979 did not cause appellant's subsequent disability due to the limb girdle dystrophy, but rather the subsequently acquired condition was independent of the prior employment injury and is therefore not compensable. The limb girdle dystrophy has not been established by medical evidence as a consequential injury related to the accepted employment injury of September 10, 1979.

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[2] *Steve J. Wagner*, 32 ECAB 1446 (1981).

[3] *Marie Denhart*, 32 ECAB 1168 (1981).

While the medical evidence indicates that appellant's limb dystrophy condition aggravates his accepted right knee condition, such aggravation has been attributed solely to the limb girdle dystrophy and not to any factor of appellant's prior employment injury or other factors of his federal employment. Appellant would be entitled to compensation if employment factors caused an aggravation of an underlying physical condition.[4] However, the aggravation of appellant's right knee is not compensable as it has been attributed to the progressive muscular dystrophy of his right lower extremity rather than his federal employment. Appellant's disability, therefore, has not been shown as employment related.

Appellant has not met his burden of proof to establish that his disability subsequent to May 11, 1982 was causally related to his September 10, 1979 knee injury.

The decision of the Office of Workers' Compensation Programs dated January 11, 1988 is hereby affirmed.

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[4] *Eugene Diachun*, 36 ECAB 360 (1984).

In the Matter of RUTH M. KELLOGG *and* VETERANS ADMINISTRATION, NURSING HOME CARE UNIT, Bath, N.Y.

Docket No. 88-684; Submitted on the Record;
Issued May 31, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was not "without fault" with respect to creating a $3,397.83 overpayment and therefore the overpayment was not subject to waiver.

On July 23, 1974 appellant, then a 48-year-old nursing assistant, filed a claim for a traumatic injury to her lower back sustained on May 23, 1973 while lifting a patient. Appellant did not stop work. Appellant subsequently filed a notice of recurrence of disability due to her May 23, 1973 employment injury. She noted that disability recurred on November 19, 1974 when she injured her back attempting to catch a patient. The Office of Workers' Compensation Programs accepted appellant's claim for a lumbosacral strain and commenced paying compensation for temporary total disability on November 19, 1974. Effective March 4, 1976 appellant was placed on the Office's automatic roll receiving $521.00 every four weeks. Appellant had indicated by Form CA-1032 dated March 23, 1977 that her husband was a dependent.

By letter decision order dated February 2, 1978, the Office found that appellant was no longer totally disabled for all work and determined that appellant's wage-earning capacity was that of a telephone solicitor, effective March 2, 1978. Appellant was notified that she would be receiving $302.00 every four weeks based on her new wage-earning capacity. Appellant requested reconsideration of the Office's determination that she had the wage-earning capacity of a telephone solicitor. By letter decision dated June 27, 1980 the Office reviewed the case on its merits and denied modification of its prior decision finding that the evidence demonstrated that appellant was not disabled from performing the work of a telephone solicitor and that the position was within her commuting area and in sufficient numbers to be reasonably available. By hearing representative decision dated September 11, 1981 and finalized September 23, 1981, the Office affirmed its prior decision finding that the position of telephone solicitor reasonably reflected appellant's wage-earning capacity.

On March 8, 1983 appellant's husband passed away.

By letter dated March 21, 1983 appellant informed the Office that her husband had passed away. Appellant stated:

> "This is to inform you he passed away on March 8, 1983. Whatever action is needed to be taken I am sure you people will take care of it."

Appellant also advised the Office of her husband's death, and that she no longer had any dependents by Form CA-1032's dated September 19, 1983, March 13, 1985, June 10, 1986 and June 15, 1987. Appellant did so by checking a box stating "No dependents. I no longer claim additional compensation on account of dependents."

The form CA-1032 was amended subsequent to appellant's submission of September 19, 1983 to include:

> "Part B. Dependents
>
> "The basic rate of compensation is 66⅔ percent of the applicable pay rate if there are no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if there are one or more eligible dependents. You must therefore answer the question below to ensure that your compensation is paid at the correct rate."

By letter dated July 15, 1987 the Office advised appellant that a preliminary determination had been made that there was an overpayment of $3,397.83 in her case. The Office stated that the overpayment occurred because:

> "Your spouse died on March 8, 1983 and you no longer had any dependents. You therefore were not entitled to the ¾ rate. You have only been entitled to the ⅔ rate since March 9, 1983."

The Office made a preliminary finding that appellant was at fault in the creation of the overpayment stating:

> "That form CA-1032 that you have read and signed, specifically states that you are entitled to additional compensation if you have dependents. You failed to have your payments adjusted and continued to accept the higher rate even though you were informed enough to know you were not entitled to the higher rate."

Appellant requested a reevaluation of the Office's finding of fault and a waiver of the overpayment if eligible. She submitted an overpayment recovery questionnaire dated July 27, 1987 which listed a monthly income of $1,167.08, monthly expenses of $1,168.13 and total assets of $300.00. Appellant contended that she was not at fault in the creation of the overpayment stating:

> "I notified OWCP of my husband's death on March 21, 1983 and requested that any necessary adjustments be made. I informed OWCP of my husband's death on each of my subsequent recertifications. OWCP has never responded to my communications concerning my claim. The only way I have been able to get a response is through my congressman. I assumed

> the appropriate steps had been taken after I reported my husband's death."

By letter decision dated October 2, 1987 the Office found that an overpayment had occurred in the amount of $3,397.83 because appellant received compensation at the augmented rate (¾) for the period after March 8, 1983 when she was only entitled to the basic rate (⅔), due to her husband's death and loss of dependent. The Office found that appellant was with fault in the creation of the overpayment because "you were reasonably aware that compensation amount should have changed. You continued to receive the same amount." The Office informed appellant that the overpayment would be recovered by withholding $62.00 from her continuing compensation benefits every four weeks effective September 27, 1987.

The Board finds that appellant was without fault in the creation of the overpayment.

The Federal Employees' Compensation Act, 5 U.S.C. section 8129(b) states that "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Conversely, no waiver of overpayment is possible if the claimant is with fault in holding to create the overpayment.[1]

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show that incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [2]

In the present case, the Office applied the third standard—acceptance of a payment which the payee either knew or should have been expected to know was incorrect—in finding appellant at fault in creating the overpayment.

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[1] *Mary Valentine*, 33 ECAB 1419 (1982).

[2] Pursuant to *Califano* v. *Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545 (1979), the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments. *See Wanda C. Brown*, 33 ECAB 1133 (1982).

Subsequent to her husband's death appellant promptly notified the Office of this fact and requested that any appropriate action be taken. The Office, although notified numerous times that appellant no longer claimed any dependents, failed to adjust appellant's compensation benefits and failed to notify appellant that she was receiving compensation improperly at the augmented 75 percent rate. Appellant had no direct evidence that the Office continued to compensate her as though she claimed dependents. It was not until the Office's July 15, 1987 letter that appellant was informed that she had been erroneously receiving compensation based on the augmented 75 percent rate for claiming dependents. Since appellant did not know she had erroneously received compensation at a rate based on having dependents until the Office found she had received an overpayment, she should not be expected to know she was not entitled to receive the compensation checks issued to her. Appellant had submitted all the necessary information requested for the period in question and had no reason to believe that she was receiving an improper amount of compensation. Accordingly, appellant was without fault in the creation of the overpayment.

The decision of the Office of Workers' Compensation Programs dated October 2, 1987 concerning the overpayment of compensation is hereby reversed. The case is remanded for the office to determine whether recovery of the overpayment should be waived.

In the Matter of PIERRE W. PETERSON *and* U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, Ind.

Docket No. 87-1365; Hearing May 5, 1988;
Issued May 31, 1988

Appearances: *Herbert A. Doyle, Jr.*, for appellant; *Paul J. Klingenberg, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant had any disability as a result of his carpal tunnel syndrome causally related to factors of his federal employment.

Appellant, a 58-year-old retired letter carrier, filed a claim alleging that he sustained a carpal tunnel syndrome as a result of his federal employment. Appellant was employed as a letter carrier 34 years. He last worked on January 17, 1985 and retired effective April 1, 1985.

In a July 1, 1985 statement appellant noted that the first persistent signs of his condition began in late November 1984. He described a "feeling of numbness, tingling of all . . . fingers with the exception of [his] little fingers; and [his] fingers would cramp and go to sleep." Appellant stated that his "symptoms became more frequent and severe" as time passed. Appellant attributed his condition to constantly gripping the steering wheel of the mail truck, gripping the bundles of mail with his left hand, and repetitive use of his hands. Appellant stated that he had worked approximately 450-500 hours of overtime in the last year that he worked, and he felt this contributed to his condition.

A January 10, 1985 nerve conduction study revealed "severe carpal tunnel syndrome bilaterally." On January 25, 1985 appellant underwent a left carpal tunnel release.

Appellant's attending physician, Dr. Raeburn M. Evans, Board-certified in family practice, submitted a July 2, 1985 report which stated in pertinent part:

> "It has been documented by several orthopedic individuals. There are a number of causes and effects that add or distract from carpal tunnel syndrome. Mr. Peterson had been involved in an occupation that does predispose itself to the development of this entity."

Dr. Evans referred appellant to Dr. John L. Beghin, an orthopedic surgeon, who initially examined appellant on January 22, 1985 with a history of numbness and tingling in the radial four digits of both hands for two months. Dr. Beghin performed the left carpal tunnel release. On February 28, 1985 appellant had developed a dystrophy type of fixture with his left hand, and he had diminished motion of all fingers and was unable to make a fist. By April 25, 1985 appellant had full range of motion of fingers and wrist, and he had good grip and complete extension of fingers. Dr. Beghin stated the following regarding causal relationship:

> "I do not believe that any factor of employment could be held responsible for his condition, as this is most often seen in a varied patient population, and was truly idiopathic.
>
> "At the time of surgery, I noted no abnormalities of the carpal canal which could be factors of causation."

On May 24, 1985 appellant was seen in consultation by Dr. James W. Strickland, a Board-certified orthopedic surgeon. At that time appellant had well-healed surgical scars extending from the distal palm across the wrist crease in an ulnar direction which were quite sensitive; Phalen's wrist flexion test was positive at 30 seconds on the left and 40 seconds on the right; Tinel's tapping test was positive on the left; and two point sensory discrimination was essentially normal. Dr. Strickland felt that appellant still had some symptoms of median nerve embarrassment, and felt that the decompressive procedures had not worked well.

Dr. Strickland submitted an August 2, 1985 report which stated in pertinent part:

> "It has been brought to my attention that this patient has been challenged with regard to the work etiology of his carpal tunnel syndromes. I would like to state that I do feel there is a significant causal relationship between this patient's employment activities and the development of bilateral median nerve entrapment. There is considerable support for occupational origin of median nerve embarrassment, particularly in men who use their hands in a vigorous manner at work. Repetitive lifting, grasping, or activities which require strong flexion of the wrist on a continuous basis have all been implicated as activities which may lead to wrist swelling and median nerve embarrassment. Although I would stop short of saying that his heavy workload at the United States Postal Service directly caused his carpal tunnel syndrome, I do think that they have been a strong aggravating factor and have at least substantially added to the degree of symptomatology. I, therefore, would take the position that there is a direct relationship between his work activity at the Postal Service and the chronic carpal tunnel compression syndromes for which this patient has been treated."

On August 15, 1985 an Office of Workers' Compensation Programs medical adviser reviewed the case record and stated, "It doesn't seem the medical evidence supports a C/R [causal relationship] to employment."

In a subsequent report dated August 31, 1985 Dr. Strickland stated the following regarding appellant's work status:

> "I would like to clarify one issue and that is, in my opinion, Mr. Peterson could not have returned to any type of vigorous

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> work activity, particularly involving the kind of work which he does which includes strong grasping with the involved hand and lengthy truck driving. I do not think it would have been applicable for him to have returned to work between January 25, 1985, and the present time because of the condition and status of his left hand."

The Office declared a conflict in medical opinion between Dr. Beghin and Dr. Strickland and referred appellant, along with a statement of accepted facts and the entire case record, to Dr. Lee M. Cattell, Jr., a Board-certified orthopedic surgeon, for an impartial evaluation. Dr. Cattell examined appellant on October 21, 1985 and submitted an October 23, 1985 report in which he related the history of appellant's condition and medical treatment and his findings on physical examination. The doctor, thereafter, concluded the following:

> "It is my clinical opinion that this patient has the following diagnoses: (1) bilateral carpal tunnel syndrome, (2) status—post-operative left neurolysis, median nerve, left, times 2.
>
> "COMMENT: The cause of a carpal tunnel syndrome is not known (idiopathic). (Dr. Beghin found no pathology at the time of his surgery).
>
> "The grasping and holding and twisting required to drive a truck or vehicle would cause an aggravation of the carpal tunnel syndrome. However, this aggravation would stop once the patient stopped work. The patient reports that he retired from work as of April 1, 1985. In my opinion, Mr. Peterson had a temporary aggravation of the carpal tunnel syndrome from November of 1984 through April 1, 1985.
>
> "It would be appropriate to know if Mr. Peterson continued to drive after his retirement. If he did, this would continue the temporary aggravation, but it would be on a nonwork basis."

A different Office medical adviser reviewed Dr. Cattell's report and concurred with his conclusion.

By letter decision dated January 16, 1986 the Office accepted that appellant's employment caused a temporary aggravation of his condition; however, the Office further found that the temporary aggravation ceased when appellant stopped work on April 17, 1985.

By letter dated April 11, 1986 appellant requested reconsideration. He stated that Dr. Cattell was not eligible to serve as an impartial specialist in his case because he performed medical examinations for the employing establishment.

The Office contacted Dr. Cattell to inquire as to his relationship with the employing establishment. Dr. Cattell advised the Office that he does perform fitness-for-duty examinations for the employing establishment upon request. He stated that he performs approximately 3–4 such examinations per year. He also stated that he is not under a contract, formal or informal, to perform such examinations.

By compensation order dated September 24, 1986 the Office denied modification of its prior decision. In an accompanying memorandum, the Office noted that Dr. Cattell did not violate the standards for impartiality.

Appellant requested the present appeal.

On November 16, 1987 the Office filed a motion to remand the case. The Director of the Office stated there was an unresolved conflict in medical opinion between Dr. Strickland and Dr. Cattell. The Director noted that the original conflict that it declared between Dr. Strickland and Dr. Beghin was improper because both physicians were appellant's physicians.

Appellant objected to the Office's motion, contending that Dr. Cattell's opinion should be excluded from the record. Appellant also requested oral argument.

In an order dated February 23, 1988 the Board denied the Office's motion and decided to proceed with oral argument on the present appeal.

The Board finds that the case is not in posture for decision.

Contrary to the Office's finding in the January 16, 1986 decision, Dr. Cattell was not an impartial medical specialist resolving a conflict in medical opinion in this case. Under section 8123(a) of the Federal Employees' Compensation Act,[1] an "impartial specialist" is used only to resolve a disagreement in opinion between an employee's physician and a physician of the United States. In the present case the Office improperly designated Dr. Cattell as an impartial medical specialist since the conflict in medical opinion was between Dr. Beghin, an orthopedic surgeon, who examined appellant upon referral from Dr. Evans, appellant's Board-certified family practitioner, and Dr. Strickland, a Board-certified orthopedic surgeon, whom appellant consulted. Neither of these physicians can be considered a physician of the United States, and a conflict in medical opinion as contemplated by section 8123(a) thus cannot be found between these two physicians.[2] The report of Dr. Cattell thus, is not given the special weight assigned to the report of an impartial specialist.[3]

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[1] 5 U.S.C. section 8123(a).

The Board finds there presently exists an unresolved conflict in medical opinion between appellant's physician, Dr. Strickland, who supported a causal relationship between appellant's carpal tunnel syndrome and factors of his federal employment, and Dr. Cattell, who examined appellant at the Office's request and concluded that appellant's employment only temporarily aggravated the carpal tunnel syndrome and that such aggravation ceased when appellant stopped work. Therefore, the case shall be remanded to the Office for referral of appellant, his case record, and a statement of accepted facts to an appropriate referee physician for a rationalized medical opinion on whether appellant's carpal tunnel syndrome is causally related to factors of his federal employment, and if so, any periods of disability.

Appellant argued that Dr. Cattell's report should be excluded from the record since he was not "impartial" because he performed fitness-for-duty examinations for the employing establishment. In *George W. Coast*,[4] the Board held that the report of the impartial specialist should be excluded from the record because the physician was involved in performing fitness-for-duty examinations for the employing establishment thus his appearance of impartiality was undermined. However, in the present case, as noted above, a conflict in medical opinion did not in fact exist, thus Dr. Cattell was not an impartial specialist, and his opinion is not entitled to special weight.

In *Carlton L. Owens*,[5] the Board held that improperly obtained medical reports from the impartial specialist will not be given any weight on review by the Board and should be excluded from the record. In the instant case, the Board has found that Dr. Cattell was not an impartial specialist, and his opinion is not entitled to special weight. Dr. Cattell's report is of sufficient weight to create a conflict with Dr. Strickland's report. The Office has the authority to refer appellant for a second opinion examination,[6] and the Board finds that Dr. Cattell's examination and opinion merely constitute a second opinion and is entitled to the same weight as the other reports of record. As such, Dr. Cattell's report will remain in the record and the case is remanded for further proceedings as outlined above.

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[2] *Albert J. Scione*, 36 ECAB 717 (1985).

[3] The opinion of an impartial specialist resolving a conflict of medical opinion must be given special weight if it is sufficiently well-rationalized and based on a proper background. *James P. Roberts*, 31 ECAB 1010 (1980).

[4] 36 ECAB 600 (1985).

[5] 36 ECAB 608 (1985).

[6] *See, supra*, note 1.

The September 24, 1986 decision of the Office of Workers' Compensation Programs is hereby set aside, the case is remanded for further proceedings in accordance with this decision.

In the Matter of HAROLD WEISMAN *and* DEPARTMENT OF ENERGY, ENERGY INFORMATION ADMINISTRATION, Washington, D.C.

Docket No. 87-1347; Hearing May 3, 1988;
Issued May 31, 1988

Appearances: *David J. Cohen, Esq.*, for appellant; *LuAnn B. Kressley, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether appellant had any disability on or after March 5, 1984 causally related to a January 9, 1984 employment injury.

On January 10, 1984 appellant, then a 49-year-old economist, filed a claim alleging he sustained injury to his low back on January 9, 1984 while placing a stack of books in a cardboard box. He did not stop work. On the reverse of appellant's claim form appellant's supervisor noted that appellant was treated at the employing establishment health unit on the date of injury.

Appellant was referred by the employing establishment physician to Dr. S. T. Cosimano, a Board-certified surgeon. Appellant was first examined by Dr. Cosimano on January 13, 1984 and was hospitalized for a low back strain. Dr. Cosimano noted that appellant had a significant past history in that he was involved in an automobile accident in 1966 at which time he sustained a fracture to the left femur and a dislocation of the left hip. Dr. Cosimano noted that the femur which became infected was removed. As a consequence, appellant developed arthritis in the hip and a sequestrum from the femur in the thigh with a resulting decrease in motion and shortening of the left leg. Dr. Cosimano noted that appellant had a history of recurring back pain following the 1966 incident. He diagnosed an acute low back strain secondary to the occupational trauma of January 9, 1984, superimposed upon a post-traumatic arthritic left hip with shortening of the left lower extremity and loss of movement. Appellant remained hospitalized for conservative treatment until January 23, 1984.

In a discharge summary dictated on January 24, 1984, Dr. Cosimano noted that x-rays were obtained of the back and hip which revealed some narrowing of L4-L5 and L5-S1 but no arthritis in this region. The left hip showed old degenerative changes secondary to trauma with an evident old fracture site healed in the left femur. Appellant was discharged on medication and flexion exercises were prescribed. Dr. Cosimano noted that appellant was seen in consultation with Dr. Charles Engh, a Board-certified orthopedic surgeon, for consideration of a hip replacement "in the next month or two following resolution of his back complaints."

On January 30, 1984 appellant was examined by Dr. Cosimano who noted in a report of that date that appellant "appears to be generally recovered from his acute episode." Appellant was followed by Dr. Cosimano with medication and exercise and on February 27, 1984 he was released to return to his normal duties beginning March 5, 1984. The February 27, 1984 report of Dr. Cosimano noted that appellant was scheduled for a total hip replacement by Dr. Engh in May and that appellant would have episodes of back pain "until such time as the surgery is done."

The record indicates that appellant returned to duty and used intermittent sick leave due to continued back and hip pain.

On May 2, 1984 appellant underwent a total left hip replacement for osteoarthritis of the left hip.

On May 17, 1984 appellant filed a notice of recurrence of disability commencing April 30, 1984 which he related to the January 9, 1984 employment injury. He did not return to work until August 14, 1984 and used sick and annual leave for the period April 30, 1984 to August 13, 1984.

By letter dated August 21, 1984 the Office of Workers' Compensation Programs advised appellant that the medical evidence of record was not sufficient to accept that his total hip replacement surgery was related to the January 9, 1984 injury. In a report dated August 28, 1984 Dr. Engh stated that he first treated appellant in an orthopedic consultation with Dr. Cosimano and obtained a history of "an on-the-job injury on January 9, 1984." Dr. Engh described that the goal of surgery was to reestablish a level pelvis by lengthening the left leg by arthroplasty, which was accomplished, and that appellant had no further significant back symptoms. Dr. Engh noted that appellant's "arthritic hip, leg length discrepancy, and hip stiffness were contributing factors leading to his inability to recover satisfactorily from his low back injury of January 1984."

On October 2, 1984 an Office medical adviser reviewed the record and noted that appellant's accepted employment injury did not aggravate, precipitate or otherwise contribute to the hip condition which required surgery.

Appellant was referred by the Office, together with the case record and a statement of accepted facts, to Dr. Maxwell Hurston, a Board-certified orthopedic surgeon. In a report dated December 10, 1984 Dr. Hurston reviewed appellant's history of injury and medical treatment, reported his findings on examination of appellant on December 5, 1984, and stated:

> "It is quite apparent from the past history and from the history obtained from the patient and the facts obtained from the reports submitted to me that this patient has had prior difficulty with his back on two occasions for which he had to be hospitalized in 1977 and 1981. Apparently these two episodes cleared without any real residuals, but the patient still maintains as a result of his 1965 automobile accident some shortening of his left leg with marked limitation of motion in the left hip and severe osteoarthritic changes as a result of that particular problem.
>
> "Because of these left hip findings it has altered the gait of this individual, so that he has thrown an excessive amount of weight on his back muscles and apparently these caused to initiate the problems that this patient has had in the past and has put him at greater risk for injury to his lower back.
>
> "I believe that the injury which occurred on January 9, 1984 was a strain of his lumbar muscles which was adequately treated and which apparently resolved to the point where he was certified as fit for duty on March 5, 1984 by his treating physician.
>
> "The treatment that he received thereafter was specifically for the problems with his left hip and all of his disability as a result of the surgery and following that episode due to the hip problem and is in no way related to his back problem."

The Office determined that a conflict was created between the reports of Drs. Engh and Hurston. Appellant was referred, together with the case record and a statement of accepted facts, to Dr.

James T. Gable, a Board-certified orthopedic surgeon. In a report dated March 8, 1985 Dr. Gable stated:

> "In [January 1984], while moving office furniture in an interoffice move, Mr. Weisman felt something go in his low back. He was admitted to National Orthopaedic Hospital and treated with bed rest, traction and appropriate medications, etc., with little to no improvement. This is different from what he had experienced in 1979 when he injured his back and was treated in a similar fashion and had a rapid return to a pain-free existence. Because of his poor response to bed rest and nonoperative treatment, evaluation by Dr. Charles Engh was accomplished. Apparently in 1965, Mr. Weisman was involved in an automobile accident incurring a dislocation of the left hip with a probab[le] fracture and a fracture of the shart of the femur. The latter was treated with an open reduction and inamedullary fixation with subsequent infection, osteomyelitis, etc., necessitating reoperation. He ultimately went to union with no apparent recurrence of the osteomyelitis.
>
> "In May 1984, Mr. Weisman underwent total hip arthroplasty. The intent of the surgery was not only to correct the painful degenerative changes about the left hip, but to improve his gait, leg length discrepancy, etc., thereby relieving some of the aggravating factors of his low back pain. Since this surgery he is indeed improved. He is ambulatory, his gait pattern by history is improving and his low back pain is diminishing."
>
> * * *
>
> "In my opinion, Mr. Weisman incurred acute lumbar strain while at work at the time of the aforementioned moving accident. This problem was prolonged and aggravated by his other anatomical problems, namely the femur and the hip."

Dr. Gable recommended that appellant continue on physical therapy for gait training and muscle strengthening and low back exercise.

The Office determined that Dr. Gable's medical opinion required clarification and, by letter dated July 22, 1985, requested that he respond to whether the incident of January 9, 1984 accelerated or aggravated the preexisting hip condition which necessitated surgery on May 2, 1984. In a response dated August 6, 1985 Dr. Gable stated:

> "In answer to your question . . . I would have to answer yes, it did; however, it must be qualified with the obvious observation that I had not seen or evaluated Mr. Weisman prior to the incident."

The Office determined that Dr. Gable's reports were not sufficient to resolve the conflict in medical opinion and by letter dated September 10, 1985, advised appellant that further medical referral would be made.

Appellant was referred, together with the case record and a statement of accepted facts, to Dr. Arthur B. Wein, a Board-certified orthopedic surgeon. In a report dated December 18, 1985 Dr. Wein reviewed appellant's history of injury and medical treatment, reported his findings on physical examination, obtained x-rays which revealed mild osteoarthritis of L4–L5 and L5–S1, and stated:

> "Note: In my opinion there is no relationship between the injury that [appellant] sustained during his employment and the need for hip surgery. In my opinion, the patient has suffered multiple low back acute traumatic sprains from which he has always made a satisfactory recovery and which have not lasted more than several weeks. It appears that the January 9, 1984 incident was one such situation. His chief complaint, however, has been his left hip and he ultimately had total hip surgery for this with satisfactory results. I find no relationship between the left hip surgical needs and the acute low back sprain from which he suffered, and which in my judgment required no more than a period of six weeks for its complete resolution, as had been the case previously. In summary, the patient has no permanent residual disabilities associated with his injuries during his employment, and at this time is capable of performing full duty without any restrictions concerning his back as such."

On January 17, 1986 the Office requested Dr. Wein to clarify his opinion by providing further rationale in support of his stated conclusion. In a response dated January 27, 1986 Dr. Wein responded:

> "The hip surgery performed was directly related to the patient's injury resulting from a car accident in 1966. [His] back sprain had no relationship to the hip discomfort, and in my judgment after a period of six weeks following the January 9, 1984 back sprain, he should have been considered able to return to the same type of work as an economist, and should

> have returned to the same status quo existing prior to the back sprain. Any aggravation he may have had in his hip was extremely temporary, and should have been resolved in the above amount of time. In my judgment, the surgery of May 2, 1984 on the hip was not necessitated or warranted by the injury of January 9, 1984."

By compensation order dated March 31, 1986 the Office rejected appellant's claim finding that the weight of medical evidence of record, established that appellant's employment-related disability ceased as of March 5, 1984.

Appellant requested a hearing before an Office hearing representative which was held on October 1, 1986. Appellant submitted the May 13, 1986 report of Dr. Cosimano who stated that appellant had not completely recovered from the January 9, 1984 injury at the time he returned to work on March 5, 1984 and that appellant did not recover completely until the corrective surgery on May 2, 1984. Appellant also submitted the May 21, 1986 report of Dr. Robin B. Merlino, a Board-certified internist, who had performed a preoperative consultation on April 30, 1984. Dr. Merlino noted that he had reviewed the records of Drs. Cosimano and Engh and that the physicians felt that appellant's back strain was secondary to an "occupational injury that exacerbated his arthritic left hip."

At the hearing, Dr. Cosimano testified that appellant had been returned to work pending surgery on May 2, 1984 as Dr. Engh did a large number of hip replacements and could not schedule appellant earlier than that date. He noted that in speaking with appellant, appellant was not working a regular schedule and had not completely recovered from the January 9, 1984 injury. Dr. Cosimano noted that once appellant went to Dr. Engh to begin his treatment, he "stepped out of the picture" and it was no longer up to him to make the determination with regard to appellant's return to full duty.

In a decision dated December 3, 1986 and finalized December 4, 1986 the Office hearing representative remanded the case to the district office for further development. The hearing representative noted that the Office was to correct the statement of accepted facts to reflect appellant's employment status upon his return to work on March 5, 1984 and prior to the time he stopped work April 30, 1984. The Office was instructed to refer the statement of accepted facts to Dr. Wein for a supplemental opinion.

On remand, the Office amended the statement of accepted facts to reflect that Dr. Cosimano discharged appellant for return on an as needed basis and certified appellant to return to work March 5, 1984. When appellant returned to work on March 5, 1984 in a limited status he took medication pending scheduling of surgery and was able to leave when his problems became painful. By letter dated January 21, 1987 the Office requested Dr. Wein to state whether this new information altered his prior opinion. In a report dated February 4, 1987, Dr. Wein responded that he was unable to "uncover any additional information that would alter the findings which I submitted in a report dated January 27, 1986."

By compensation order dated April 14, 1987 the Office rejected appellant's claim for compensation after March 5, 1984 finding that the weight of medical evidence established that disability after that date was not causally related to the January 9, 1984 employment injury.

The Board finds that appellant's disability for the period April 30, 1984 through August 13, 1984 was causally related to the January 9, 1984 employment injury.

Appellant sustained an injury to his low back on January 9, 1984 while placing books in a cardboard box. The medical evidence of record reveals that appellant was diagnosed as having a low back strain which was superimposed upon a post-traumatic arthritic left hip. Appellant was treated conservatively and on February 27, 1984 was released by Dr. Cosimano to return to work effective March 5, 1984. Dr. Cosimano noted, however, that appellant had been scheduled for a total hip replacement by Dr. Engh and that appellant would continue to have back complaints until such time as the surgery was performed. Appellant stopped work on April 30, 1984 alleging a recurrence of disability which he attributed to the January 9, 1984 employment injury. He underwent surgery on May 2, 1984 and returned to work on August 14, 1984.

Dr. Engh, a Board-certified orthopedic surgeon, reported that appellant's arthritic left hip, leg length discrepancy and hip stiffness were contributing factors leading to appellant's inability to recover from the January 9, 1984 low back injury and he related appellant's disability commencing April 30, 1984 to the accepted employment injury. Appellant was thereafter referred for a second opinion to Dr. Hurston, a Board-certified orthopedic surgeon, who noted that appellant's 1965 injury resulted in an altered gait which threw an excessive amount of weight on appellant's low back muscles and put appellant at a greater risk for low back injury. He concluded, however, that the January 9, 1984 employment injury resulted in a low back strain which resolved by the time appellant was certified to return to duty on March 5, 1984.

Based on the conflict in medical opinion between Dr. Engh and Dr. Hurston, appellant was referred, together with the case record and a statement of accepted facts, to Dr. Gable, a Board-certified orthopedic surgeon, selected by the Office as the impartial medical specialist under 5 U.S.C. section 8123(a).[1] In a March 8, 1985 report, Dr. Gable reviewed appellant's history of injury and noted that the January 1984 employment injury was different from prior back injuries appellant had experienced in that appellant did not respond to conservative care. For this reason, appellant was evaluated by Dr. Engh who performed a total hip arthroplasty which Dr. Gable noted was not only to correct the degenerative changes about the left hip but which was performed to improve appellant's gait and leg length and relieve the aggravating factors contributing to appellant's low back condition. Dr. Gable concluded that the January 9, 1984 employment injury resulted in an acute lumbar strain which was prolonged and aggravated by appellant's femur and hip and which did not resolve until after appellant's surgery of May 2, 1984. Dr. Gable was requested by the Office to clarify his opinion, and on August 6, 1985 responded that the January 9, 1984 employment injury had aggravated appellant's preexisting hip condition which necessitated surgery on May 2, 1984.

The Board finds that the weight of medical opinion is represented by the report of Dr. Gable, the impartial medical specialist selected by the Office to resolve the conflict in medical opinion. In situations where a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.[2] The reports of Dr. Gable were based on an accurate history of appellant's condition and provided medical rationale for his expressed conclusion that the January 9, 1984 injury aggravated appellant's preexisting left hip condition which, in turn, prolonged appellant's acute lumbar strain which did not resolve until following surgery on May 2, 1984. For this reason, the reports of Dr. Wein have not been given any weight by the Board in the present appeal. As the first impartial specialist had resolved the issue in his reports, the Office's referral of appellant to a second impartial specialist was improper and such action is open to the suspicion that the Office was seeking a medical opinion favorable to its view.[3]

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[1] 5 U.S.C. section 8123(a).

[2] *See Hugh C. Dalton*, 36 ECAB 462 (1985); *James P. Roberts*, 31 ECAB 1010 (1980).

[3] *See Carlton L. Owens*, 36 ECAB 608 (1985); *Arthur Stockel*, 36 ECAB 643 (1985).

The December 3, 1986 decision of the Office of Workers' Compensation Programs, finalized December 4, 1986, is reversed.

In the Matter of JAY LOWENTHAL *and* U.S. POSTAL SERVICE, POST OFFICE, Tempe, Ariz.

Docket No. 87-1456, Issued May 31, 1988

ORDER GRANTING PETITION FOR RECONSIDERATION AND REVERSING PRIOR BOARD DECISION

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The Board issued its decision and order in the above entitled matter on October 30, 1987. On November 24, 1987 the Director of the Office of Workers' Compensation Programs filed a petition for reconsideration contending that "the Board's decision applie[d] an incorrect standard [based] on *George Witte* I,[1] in determining whether Dr. Andre C. Matthews was 'authorized' to treat appellant's alleged cervical strain," and that the correct standard was that outlined in *George Witte* II.[2] The Director further contended that the Board should affirm the Office's denial of reimbursement for Dr. Matthews' medical services because, under the *Witte* II standard, the Office did not abuse its discretion in denying reimbursement for the doctor's services.

On December 24, 1987 appellant filed a reply to the petition contending that he should be reimbursed for Dr. Matthews' medical services "regardless of the fact that improper forms were used."

The Board has carefully considered the matter and concludes that the petition should be granted and the Board's October 30, 1987 decision be reversed.

As the Director correctly pointed out, the standard for reviewing situations where a CA-17 "Duty Status Report" form, rather than a CA-16 "Authorization of Examination and/or Treatment" form, is used in connection with obtaining medical care is outlined in *George Witte* II where the Board held that the Office should exercise its discretion in determining whether to approve payment for treatment secured in the absence of a valid form CA-16 authorization. That decision was based on § 10.403 of the applicable federal regulations which states, "In cases of an emergency or cases involving unusual circumstances, the Office may, in the exercise of its discretion, . . . approve payment for medical expenses incurred otherwise than as authorized in this section [*i.e.* authorized by a properly completed CA-16 form]." [3] The Board found in *Witte* II that under the circumstances of that case, the supervisor "utilized form CA-17 in such fashion and intended that such forms constitute authorization for treatment," and that the Office, therefore, abused its discretion in refusing to pay for medical expenses.

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[1] Docket No. 86-417 (issued February 27, 1986).

[2] 38 ECAB 585 (1987).

The facts in the present case do not show there was an "emergency" or "unusual circumstances" or other factors which convince this panel that the supervisor intended authorization by using a CA-17 form in lieu of a CA-16 form. The alleged injury occurred on September 4, 1986. Appellant filed the claim on September 27, 1986. Appellant's supervisor completed the CA-17 forms and appellant was examined by Dr. Matthews on October 6 and 20, 1986. Thus, appellant did not obtain any medical care for the alleged injury until over a month after the injury. There is no evidence that there was an "emergency" or "unusual circumstances" which precluded the supervisor from expressly authorizing medical treatment by use of a properly completed CA-16 form, or that the supervisor used the CA-17 forms so as to authorize medical examination and treatment. The Board therefore finds that the Office did not abuse its discretion in refusing to reimburse appellant for Dr. Matthews' medical services.

IT IS ORDERED that the petition for reconsideration be granted, the decision of the Board dated October 30, 1987 be reversed, and the decisions of the Office of Workers' Compensation Programs dated January 9, 1987 and May 22, 1987 be affirmed without modification.

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[3] 20 C.F.R. section 10.403

In the Matter of JOHN H. WOODS, JR. *and* U.S. POSTAL SERVICE, POST OFFICE, Knoxville, Tenn.

Docket No. 88-675; Submitted on the Record;
Issued June 2, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether appellant had any disability for work on or after August 5, 1986 causally related to his July 9, 1986 employment injury; and (2) whether appellant's injury on April 1, 1987 constituted an injury sustained in the performance of duty.

On July 9, 1986 appellant, then a 38-year-old mailhandler, filed a claim alleging that he had sustained injury to his left testicle, groin, and back on that date while "dumping" a full mail pouch. On the reverse of the claim form, appellant's supervisor noted that appellant had sought medical treatment on July 9, 1986 at the East Tennessee Baptist Hospital, that appellant had not stopped work, and that continuation of pay was not controverted.

On July 11, 1986 Dr. S. Reed submitted a report which reviewed appellant's history of injury, noted that appellant had normal lumbar lordosis, no scoliosis, no spasm of his perilumbar muscles, and no hernia. Dr. Reed reported that no abnormality had been detected on x-ray, and opined that appellant would be able to resume regular work in four to twenty-one days.

On July 9, 1986 Dr. James Green, a Board-certified general surgeon, completed a form CA-17 in which he reported a diagnosis of varicose left testicle, and opined that appellant should be evaluated by a urologist before he returned to work. On July 10, 1986 and July 14, 1986 Dr. Reed reported in CA-17 form reports that appellant's diagnosis was "low back syndrome-radicular pain secondary to same," and that appellant had been restricted to light-work activity since July 10, 1986.

Appellant was scheduled to undergo EMG studies on July 14, 1986. Dr. Bertram Henry, a Board-certified neurologist reported, however, that appellant deferred testing, stating that he was returning to work.

Dr. David Fardon, a Board-certified orthopedic surgeon, completed Office of Workers' Compensation Programs forms CA-17 on July 17, 1986 and July 24, 1986, in which he diagnosed appellant's condition as "lumbar strain" and reported that appellant could return to work on July 24, 1986 with a limitation that he not lift over 50 pounds, or over 25 pounds on a frequent basis.

On August 5, 1986 Dr. John Purvis, a Board-certified neurosurgeon, stated as follows:

> "*PRESENT ILLNESS:* This thirty-eight-year-old male has had right-sided headache and pain in his face and neck. This is a steady aching pain which started on July 31, 1986. He has been to the emergency room at Baptist; they gave him some medication including Tylox which didn't seem to help him. This was a rather sudden pain in onset. In 1971, he had a similar episode and had an injection in his neck and had no further problem until now. He has had no shoulder or arm pain. He has had some lower back pain following a lifting accident about July 9, 1986.
>
> "*IMPRESSION:* 1. Probable tension headache."

Dr. Purvis also submitted his progress notes pertaining to appellant's care and treatment from August 13, 1986 until September 26, 1986. On September 3, 1986 Dr. Purvis noted that appellant was still experiencing lower back pain and headaches. The doctor, then referred appellant for physical therapy treatments to the lower back. On September 26, 1986 Dr. Purvis noted that appellant could return to work at his regular duties on September 29, 1986.

On August 28, 1986 and September 15, 1986 Dr. Purvis submitted CA-17 reports in which he noted that the date of first examination was August 5, 1986, diagnosed appellant as suffering from severe headaches and back pain, gave the history of injury as a "lifting accident," and reported that appellant had been totally disabled due to a hospitalization from August 5, 1986.

On October 29, 1986 the Office informed appellant that his claim had been accepted for a lumbar strain. The Office requested that appellant submit his hospital records and a statement from his physician as to why the hospitalization was necessary and how it related to his July 9, 1986 injury.

On December 1, 1986 Dr. Purvis reported as follows:

> "It was necessary for Mr. Woods to be hospitalized because of severe lumbar pain and headaches. I feel the back pain is directly related to his injury on July 9, 1986, and the headaches [are] secondary to his back pain."

Dr. Purvis also submitted records which included diagnostic testing performed during appellant's August 1986 hospital stay. A CAT scan was performed on August 14, 1986. Dr. Robert Moore reported an impression of "old small infarct in the medial aspect of the left occipital lobe." An angiography performed on August 14, 1986 was interpreted by Dr. James Guytonmd as follows: "nonvisualization of a left internal carotid artery which has presumably been totally occluded. Differential would include congenital absence of the left internal carotid artery." An x-ray was taken of appellant's cervical spine on August 19, 1986 which revealed "calcification within the anterior longitude ligament in an otherwise normal cervical spine series."

On January 5, 1987 the Office wrote to Dr. Purvis and requested that he provide further information, including whether he believed appellant's headaches were related to his July 9, 1986 lifting injury, whether appellant's hospitalization was for low back pain or the headaches, whether appellant's disability was due to the back condition or the headaches, and whether a more complete diagnosis of appellant's back condition could be provided. On January 5, 1987 the Office also requested that appellant describe in detail his headache condition and all problems he had ever had with headaches.

On February 18, 1987 appellant wrote the Office and advised that his headaches had started when he hurt his back, appellant alleged that he had never had any problems with headaches until that time.

On February 9, 1987 Dr. Purvis submitted a form CA-17 in which he reported the diagnosis of appellant's condition as "lumbar strain, tension headaches," his findings as "lumbar strain, tension headaches" and by checking a box indicated that appellant's disability was causally related to the history of injury.

By compensation order dated May 28, 1987, the Office denied appellant's claim finding that appellant had failed to discharge his burden of proof.

On April 2, 1987 appellant filed a claim alleging that on April 1, 1987 he had sustained a lower back and rear-end injury as a result of being "kicked in the lower part of back and rear end," at 3:00 p.m. On the reverse of the claim form appellant's supervisor noted that appellant's regular work hours were from 3:00 p.m. to 11:30 p.m. and that appellant had stopped work on April 1, 1987. The supervisor indicated that the employee was not injured while in the performance of duty.

On April 2, 1987 Dr. Walter Beabon diagnosed appellant as having sustained a "sprain and contusion of the right low back," and reported that appellant had been totally disabled from April 1, 1987.

On April 10, 1987 Dr. Joe Crumley, an orthopedic surgeon, reported as follows:

> "This patient was seen for orthopedic evaluation on April 10, 1987. He states that on April 1, 1987, he was kicked in the back by a fellow employee while clocking in. Since that time, he has had discomfort located in the right lower back region but denies any radicular type pain. He has been treated with physical therapy, appropriate sedative and muscle relaxants.
>
> "On examination, he has a full range of motion of the lumbar spine without deformity, no local evidence of contusion or hemorrhages present. Neurological examination is normal.
>
> "I reviewed the x-rays made at the Baptist on April 1, 1987 which included films of the lumbar spine and pelvis and these are perfectly normal and show no evidence of any traumatic abnormalities.
>
> "Diagnosis: Contusion of the back.
>
> "I think the patient should continue his current method of treatment and is probably able to return to work on a limited basis."

On April 13 and April 14, 1987 Dr. Reed reported that appellant could return to light-duty work on April 14, 1987.

By compensation order dated May 22, 1987 the Office denied appellant's claim finding that claimant had not met his burden of proof to establish that his injury occurred while in the performance of duty.

With regard to the issue of whether appellant's disability for work after August 5, 1986 is related to his July 9, 1986 injury, the Board finds that the case is not in posture for decision.

On July 9, 1986 appellant sustained an injury to his low back while "dumping" a mail pouch. The record reflects that appellant did not stop work until August 5, 1986 at which time he was hospitalized. On October 29, 1986 the Office accepted appellant's claim for lumbar strain; however, it requested further medical information as to whether appellant's hospitalization was related to his July 9, 1986 injury. On December 1, 1986 Dr. Purvis reported that appellant was hospitalized because of severe lumbar pain and headaches. The doctor also reported that appellant's back pain was directly related to his injury of July 9, 1986 and that the headaches were "secondary" to his back pain. On February 9, 1987 Dr. Purvis submitted a form CA-17 in which he again reported that appellant's lumbar strain and tension headaches were causally related to his injury of July 9, 1986.

While Dr. Purvis' reports are insufficient to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that appellant's disability was causally related to his employment injury, they constitute, in the absence of any opposing medical evidence, sufficient evidence in support of appellant's claim to require further development of the record by the Office.[1]

The Office on remand shall refer appellant to an appropriate specialist for examination and determination of whether appellant's disability and hospitalization after August 5, 1986 were causally related to his July 9, 1986 employment injury.

Regarding the issue of whether appellant's April 1, 1987 injury was sustained in the performance of duty, the Board finds that the case is not in posture for decision.

The Federal Employees' Compensation Act[2] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "while in the performance of duty" in the Act has been interpreted to be the equivalent of the commonly found prerequisite in workmen's compensation law of "arising out of and in the course of employment."[4] "In the course of employment" deals primarily with the work setting, the locale and time of the employee's performance of his work assignment;[5] "arising out of the employment" encompasses not only the work setting but also a causal concept, the requirement being that the employee caused the injury.[6] In deciding whether an injury is covered by the Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.[7] Accordingly, appellant has the burden of establishing the occurrence of the alleged injury at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with the employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto,[8] by a preponderance of the reliable, probative and substantial evidence.[9]

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[1] *Horace Langhorne*, 29 ECAB 820 (1978).

[2] 5 U.S.C. section 8101, *et seq.*

[3] *George A. Fenske, Jr.*, 11 ECAB 471 (1960).

[4] *Id.*

[5] *See Nona J. Noel*, 36 ECAB 329 (1984).

[6] *George A. Fenske, Jr.*, *supra* note 3.

[7] *Leo Boyd Purrinson*, 30 ECAB 644 (1979).

The Board has previously held that an injury occurring while standing in line to punch a time clock is an incident of employment.[10] In the case of *Robert L. Williams*,[11] the claimant was standing in a line waiting to clock out; the claimant in a friendly greeting, slapped a co-employee lightly on the chest; the co-employee then pushed claimant causing him to fall. The Board found that the friendly scuffle while waiting to clock out was not "willful misconduct" or "intent to injure or kill himself or another" which would preclude compensability under the Act, but was incidental to the employment, and thus occurred in the performance of duty.

Since the *Williams* decision, however, the Board has differentiated between injury occurring from "horseplay" among co-employees and injury resulting from private animosity among the co-employees. The Board has thus held when animosity or dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise out of employment.[12]

Appellant has alleged that he sustained a low back injury on April 1, 1987 when he was kicked by a co-employee while "clocking in" at 3:00 p.m., the commencement of his regular work hours. The information surrounding the April 1, 1987 incident comes from the April 10, 1987 report of Dr. Crumley who noted a history that appellant was kicked by a co-employee while clocking into work. No further details surrounding the incident have been submitted to the record and the Board does not have sufficient information to determine whether appellant's injury was due to horseplay or due to a private dispute imported into the workplace from appellant's private life.

The Office, on remand, should obtain statements from appellant and co-employee involved in the April 1, 1987 incident, as well as any witnesses in order to determine the circumstances surrounding the injury. Following such further development of the case record as deemed necessary by the Office, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated May 22, 1987 and May 28, 1987 are hereby set aside and the case is remanded to the Office for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

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[8] *Carmen B. Gutierrez*, 7 ECAB 58 (1954).

[9] *Katherine A. Williamson*, 33 ECAB 1696 (1982).

[10] *Robert L. Williams*, 1 ECAB 80 (1948).

[11] *Id.*

[12] *George A. Fenske, Jr.*, *supra*, note 3.

In the Matter of MARIA KUNSMAN *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, Sepulveda, Calif.

Docket No. 88-696; Submitted on the Record;
Issued June 3, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant had any disability due to her April 23, 1983 employment injury subsequent to March 15, 1987, the date the Office of Workers' Compensation Programs terminated compensation.

The case has been on appeal previously.[1] In a September 25, 1987 decision, the Board found that the case was not in posture for decision. The Board noted that Dr. Lawrence Adler, a Board-certified orthopedic surgeon acting as an impartial specialist, concluded that no objective finding of a medical nature had been identified to explain appellant's continued complaints and inability to work. He stated that the final CT (computerized tomography) scan, performed on July 24, 1984, substantiated the fact that no true spinal stenosis or herniated disc was present. The Board indicated, however, that appellant had submitted a September 22, 1986 magnetic resonance imaging (MRI) of appellant's lumbar spine which revealed severe spinal stenosis at the L4-L5 level. The Board pointed out that Dr. Adler did not have this MRI report at the time he made his determination on whether appellant had spinal stenosis. The Board set aside the Office's February 17, 1987 decision so that the Office could refer the MRI report to Dr. Adler and ask whether the report changed his opinion. The facts in that case are hereby incorporated by reference.

The Office referred the MRI report to Dr. Adler and requested his opinion on whether the MRI report altered his previous opinion. In an October 27, 1987 report, Dr. Adler stated:

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[1] Docket No. 87-1004 (issued September 25, 1987).

"The MRI report dated September 22, 1986 and done in Phoenix, Arizona was reviewed. With respect to the report itself, I note that the radiologist felt the examination was 'somewhat compromised' because of the patient's movement and her obesity. Furthermore, I suggested that the finding would be better evaluated with myelography since his primary finding was arachnoiditis, *i.e.*, scarring about the covering of the dural sac at the L1 level. This kind of scarring, unless it was caused by bleeding at the time of myelography, cannot be explained on the basis of any known work incident or injury.

"It is quite appropriate for MRI studies to show disc degeneration and desiccation as this study did. It is not appropriate for a diagnosis of spinal stenosis to be made on the basis of an MRI, since the doctors described narrowing of 'thecal sac.' True spinal stenosis is a narrowing of the bony elements through which the spinal nerves pass at the L1 level distalward and is caused by thickening of the ligaments binding the vertebra together as well as the ligaments surrounding the smaller facet joints as well as bony spurs at the facet joint levels and bony bulging vertebral bodies at the attachments of the posterior longitudinal ligaments. Spinal stenosis can occur in the midline and as the spinal nerves pass out beneath the facet hypertrophy, *i.e.*, overgrown facet joints regions.

"Spinal stenosis is not a diagnosis, but is used to explain arachnoid or thecal sac narrowing. And an MRI study is a poor study to delineate the kind of hypertrophic facet changes and ligamentum hypertrophy which are described as the findings. Furthermore, nowhere in the doctor's 'findings' is there a note to suggest disc protrusion. However, in the final paragraph on his first page of the report, he alludes to a disc protusion at this level, though he does caveat when he states that the finding would best be confirmed by myelography.

"I would certainly agree since the MRI study really shows fat content and water content from which we may allude to soft tissue involvements in this region, but it cannot well-define spinal stenosis, and I'm afraid the emphasis of this doctor's report is on a spinal stenosis.

"I would be very happy to review the actual films for you as I think this report clouds the issues.

"Certainly, the CT scan done in 1984, over three years ago, was normal and did not suggest disc protusion or spinal stenosis. The lumbar myelogram, *i.e.*, the study that the radiologist recommended, was also interpreted as being within normal

> limits. This would suggest that whichever the present changes are which the radiologist describes in 1986, they have developed subsequently, they are therefore not related to the multiple minor injuries this lady describes, but rather to the grinding effects of her obesity and her poor muscle tone.
>
> "I can find no reason based upon the report which you sent, therefore, to change my opinions as expressed in my February, 1986 report."

In a November 30, 1987 decision, the Office found that appellant had no disability beyond March 15, 1987, on the ground that the weight of the medical evidence established no continuing disability or impairment causally related to appellant's April 28, 1983 injury.

The Board finds that the weight of the medical evidence establishes that subsequent to March 15, 1987 appellant had no disability causally related to her April 28, 1983 employment injury.

Once the Office accepts a claim and begins payment of compensation, it has the burden of establishing that the condition for which compensation was paid has ceased or is no longer causally related to her employment injury.[2] The Office has met that burden here.

Dr. Adler, acting as an impartial specialist, indicated in his first report that he found no objective evidence in support of appellant's disability, pointing out that a 1984 lumbar CT scan showed no true spinal stenosis or herniated lumbar disc. After reviewing the MRI report, Dr. Adler explained in detail that an MRI could not define a spinal stenosis as it showed fat and water content but not the hypertrophic facet changes and ligament hypertrophy which cause spinal stenosis. Dr. Adler also pointed out that the changes shown in the MRI occurred subsequent to the 1984 myelogram which was normal and was therefore due to the grinding effects of her obesity and poor muscle tone. Dr. Adler's reports, given in the role of an impartial specialist, are well-reasoned and based on an accurate history and therefore are entitled to special weight.[3] In the circumstances of this case, Dr. Adler's reports constitute the weight of the medical evidence and provide sufficient support for the Office's decision to terminate appellant's compensation.

The decision of the Office of Workers' Compensation Programs, dated November 30, 1987, is hereby affirmed.

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[2] *James R. Dorris*, 30 ECAB 979 (1979).

[3] *James P. Roberts*, 31 ECAB 1010 (1980).

In the Matter of ANTHONY PESTANA *and* DEPARTMENT OF THE NAVY, BOSTON NAVAL HOSPITAL, Boston, Mass.

Docket No. 87-563; Hearing May 11, 1988;
Issued June 7, 1988

Appearances: *Richard E. Daly, Esq.*, for the appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are whether the Office of Workers' Compensation Programs properly determined: (1) that appellant was no longer totally disabled after February 25, 1981, and (2) that appellant's wage-earning capacity after February 25, 1981 was properly represented by the position of order clerk.

On April 26, 1973 appellant, then a 54-year-old carpenter, filed a claim alleging back injury on March 6, 1973 when he slipped on a steam-covered window sill while examining the upper sash for fan installation and fell hard on his left leg. Also on April 26, 1973 appellant filed a claim alleging back injury on March 29, 1973 when he lost control of the end of a solid core door he was carrying, dropping it and hurting his back. Appellant worked intermittently until May 8, 1973 when he stopped work completely.

On July 20, 1973 the Office determined that appellant had sustained employment-related low back strain and authorized payment of medical benefits and compensation for temporary total disability. On January 21, 1974 the Office also accepted that appellant had sustained a herniated disc at L-4 as a result of his employment injuries, for which he underwent surgery on June 28, 1973. Appellant received temporary total disability compensation benefits commencing May 8, 1973. In a CA-20 attending physician's report Dr. I. G. McQuarrie, the employing establishment neurosurgeon who operated on appellant, opined that appellant could return to light duty on October 29, 1973 with restrictions of no bending, stooping, prolonged standing or sitting, and no lifting over five pounds. Appellant did not return to duty. On January 30, 1974 Dr. McQuarrie opined that appellant continued to be disabled from low back pain and left leg sciatica. On March 13, 1974 Dr. McQuarrie recommended that appellant be retired for permanent low back disability.

In a May 3, 1976 report Dr. Peter B. Germond, a Board-certified orthopedic surgeon to whom the Office referred appellant for an evaluation, noted a well-healed, non-tender L4-5 laminectomy site, that appellant's back was stiff with side bends done at about 50 percent of normal, back extension done at 50-60 percent of normal, and flexion done at 70 percent of normal, and that a defect in the spinous process was palpable at the L4-5 level. Dr. Germond diagnosed "chronic low back instability as a result of [a] wide laminectomy superimposed on rather severe osteoarthritis of [the] lumbar spine," and concluded that while appellant could no longer work as a carpenter, "he could perhaps be retrained in some more sedentary type of occupation not requiring prolonged work on his feet or lifting." On August 25, 1976 an Office medical adviser reviewed Dr. Germond's report, found appellant fit for sedentary employment, and listed appellant's work restrictions.

By letter dated March 9, 1977 the Office advised appellant that if and when he was able to perform some type of work, his compensation benefits would be redetermined, and that if he remained partially disabled, his compensation would be computed on a loss of wage-earning capacity caused by his partial disability, based either on what he was actually earning at that time, or on what he should be able to earn at a job within his work limitations.

On September 8, 1977 an Office medical adviser again reviewed Dr. Germond's reports, found appellant fit for sedentary employment, and listed his work restrictions.

By letter dated November 28, 1977 the Office advised appellant that medical evidence showed he was no longer totally disabled for work and that his wage-earning capacity in his partially disabled condition would be determined.

On a work restriction evaluation questionnaire dated November 24, 1980 Dr. Germond noted "no apparent change in status," and he attached an office report of appellant's most recent examination on September 20, 1977 which noted no change from the 1976 evaluation.

On December 1, 1980, an Office claims examiner selected the position of "order clerk" as representative of appellant's wage-earning capacity, based on his work restrictions and background, and verified both the availability and wage rate of this job. On January 9, 1981 the same Office medical adviser concluded that appellant was physically capable of performing the duties of the selected position.

Thereafter, on February 12, 1981 the Office issued a compensation order in which it determined appellant's loss of wage-earning capacity, based on his ability to perform the duties of an order clerk. This determination was made effective as of February 26, 1981, at which time appellant's compensation was adjusted.

By letter dated March 1, 1981, appellant requested reconsideration. In support of his request, appellant submitted a March 27, 1981 report by Dr. Germond, who related the results of a March 3, 1981 examination. Dr. Germond stated the following:

> "His back was quite stiff for any range of motion. . . . He had negative straight-leg raising tests. . . . New x-rays were taken and again revealed the wide two-level total laminectomy he had at the L4 and L5 lamina. He has some ankylosing spondylitis occurring at the L3–4 level of his spine and some arthritis at the L4–5 and L5–S1 apophyseal joints bilaterally. He certainly seems at age 61 to still be totally disabled for work as a carpenter. . . . He seems to function reasonably well for daily activities."

In an April 22, 1981 compensation order the Office denied appellant's reconsideration request without reviewing the case on the merits, finding the evidence submitted of a repetitious nature.

On May 22, 1981, appellant requested a hearing before an Office hearing representative on the issue of whether the position of order clerk reasonably represented his wage-earning capacity. At the August 12, 1981 hearing, appellant appeared and testified in his own behalf. In a decision dated November 17, 1981 and finalized November 23, 1981, the hearing representative found that the Office had satisfied its burden of proof in establishing that appellant was no longer totally disabled as a result of his March 6, 1973 accepted work-related injury and that Dr. Germond's March 27, 1981 report did not address appellant's disability for a sedentary position such as order clerk, and affirmed the Office's February 12, 1981 and April 22, 1981 compensation orders.

By letter dated December 3, 1981, appellant again requested reconsideration. In support of his request, appellant submitted a December 9, 1981 report by Dr. Germond. Dr. Germond related the following:

> "I have stated in the past that he was disabled for work as a carpenter but that he might be able to do work of a sedentary nature; however, he gets pain in his back just from sitting which is often the most uncomfortable for him. His problem is further complicated by the development of diabetes which has

> increased his back pain and the effects of his arthritis. He has recently undergone several caudal epidural cortisone injections for relief of his pain which have been of some benefit; however, I would have to consider him totally disabled for work of any nature."

In a March 31, 1982 response to an Office request, Dr. Germond reported appellant's work restrictions, noting that he had reached maximum improvement and could work from two to four hours a day.

In a June 7, 1982 letter the Office referred appellant, together with the entire case record, to Dr. Paul W. Hugenberger, a Board-certified orthopedic surgeon, for a second opinion examination. In his June 28, 1982 report Dr. Hugenberger related appellant's history and his findings made on physical and x-ray examination. Dr. Hugenberger reviewed the evidence of record and noted the following:

> "[Appellant] brought in with him all the x-rays taken at the Beverly Hospital on May 3, 1976 of the lumbosacral spine, taken following his back surgery . . . they show . . . the presence of a complete laminectomy at L4–L5 with normal alignment of the back, with some asymmetry of the facets at L5–S1 which of course is congenital. There is also some bone formation or osteophytosis on the right side of L3 and L4. . . . No evidence of significant arthritis. He also brought in x-rays taken at the Beverly Hospital on March 3, 1981 which included AP, lateral, and right and left oblique views. . . . In the oblique views there is some degenerative change visible between L5 and S1 on the right side with slight anterior spur formation on the L4 vertebral body, slightly more marked as compared with a similar x-ray taken on May 3, 1976; after all that is a six-year interval between the x-rays, and I didn't think the changes were very great for that period of time."

* * *

> "Diagnosis is osteophytosis, lumbar spine, laminectomy at L4–L5, degenerative changes in the apophyseal joints at L4 and L5. Except for the laminectomy and perhaps the increased lumbosacral angle, x-ray findings are not particularly abnormal for a man of his age and weight."

* * *

> "It is obvious that the [appellant] is not totally disabled at present. . . . At any rate he is partially disabled, I am sure, and I suppose that partial disability will be permanent because of the type of x-ray findings and the fact that he will be getting older, especially so if he has inadequate conservative treatment. On the basis of my examination at this time I really couldn't find anything significantly wrong with him except for the positive x-ray findings. * * * In my opinion I think he can do light work if he does it properly. . . .
>
> "[R]egarding the job classification form—I certainly think he could at this time perform duties of any one of the three positions that he would prefer, and any other light job where he doesn't have to sit for a long time, or do any heavy lifting or bending."

On July 9, 1982, the Office medical adviser reviewed Dr. Hugenberger's report, agreed with his conclusions, and opined that appellant was able to perform the duties of an order clerk.

By compensation order dated July 27, 1982, the Office denied appellant's application for review finding the evidence submitted lacking substantial probative value and insufficient to warrant review.

On April 1, 1985 appellant again requested reconsideration based on numerous follow-up reports submitted by Dr. Germond since the July 27, 1982 compensation order. Included among these submissions was a September 10, 1982 report in which Dr. Germond noted that appellant had "quite adequate control of his diabetes" and that "[s]econdary arthritic changes ha[d] set in his back since [1973] . . . at least partially as a result of the original injury." A February 16, 1984 report noted that in 1976 Dr. Germond's initial impression was that appellant had "chronic low back pain and instability as a result both of the wide laminectomy performed superimposed on rather severe osteoarthritis of the lumbar spine," and that although he was totally disabled for work as a carpenter, "he could perhaps be retrained for some more sedentary type of occupation"; also noted were 1981 x-ray results which revealed ankylosing spondylitis at the L3-4 level and some arthritis at the L4, L5, and S1 apophyseal joints. Dr. Germond went on to state that by 1984 appellant "should probably be retired for work" as a result of diabetes and arthritis, but concluded that "with these problems he could return to most types of work of a sedentary nature."

In a March 15, 1985 work restriction evaluation Dr. Germond detailed appellant's activity limitations, indicated that appellant had reached maximum improvement, and opined that he could work four hours a day.

In a July 11, 1985 letter to appellant, an Office claims examiner reviewed the medical evidence and explained the type of evidence needed to warrant modification of the loss of wage-earning capacity determination. In response, appellant submitted a May 20, 1986 work restriction evaluation by Dr. Germond which indicated that he could work for four hours a day.

By compensation order dated October 17, 1986 the Office reviewed the case on its merits and denied modification of the prior order finding the evidence submitted insufficient to warrant modification of its prior determination.

Once the Office has made a determination that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.[1]

The Board finds that the May 3, 1976 report from Dr. Peter Germond, a Board-certified orthopedic surgeon, which was based on a thorough examination of appellant and a complete review of the factual and medical evidence of record, was well-rationalized and supported by the facts and constituted evidence of sufficient weight to meet the Office's burden to initiate a loss of wage-earning capacity determination and a reduction in compensation benefits because appellant was no longer totally disabled for all gainful employment at that time. Based on this report, on August 25, 1976 an Office medical adviser found appellant fit for sedentary employment and detailed his specific work restrictions. On September 8, 1977 an Office medical adviser again reviewed the record and again found appellant fit for sedentary employment, and by letter dated November 28, 1977 the Office advised appellant that medical evidence showed that he was no longer totally disabled for work and advised that his wage-earning capacity in his partially disabled condition would be determined.

However, the Board notes that such wage-earning capacity determination was not made for more than three years after the date of the advisory letter and for almost five years after appellant's most recent thorough physical examination and evaluation.

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[1] *See Edward L. Havener*, 35 ECAB 268 (1983); *Raymond E. Romeo*, 34 ECAB 1010 (1983); *Ellen G. Trimmer*, 32 ECAB 1878 (1981).

A reduction in benefits for partial disability is accomplished under section 8115 of the Act by the determination of any appellant's wage-earning capacity.[2] In determining compensation for partial disability ". . . the wage-earning capacity of an employee is determined * * * with due regard to—(1) the nature of his injury; (2) the degree of physical impairment; * * * [and] other factors or circumstances which may affect his wage-earning capacity in his disabled condition." Section 10.303(a) of 20 C.F.R. explains that a partial disability rate of compensation "shall be determined by the Office by selection of a job after having given due regard to the nature of the employee's injury, the degree of physical impairment, . . . and other factors or circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[3] In *Ellen G. Trimmer*,[4] the Board found that the Office did not meet its burden of justifying the reduction of the employee's temporary total disability compensation due to fatal defects in its determination. The Office based its decision on an August 4, 1975 work tolerance limitations report by the employee's attending physician, but by the time the Office determined in July 1977 that the employee was no longer disabled, this report was almost two years old and the passage of time had lessened the relevance of the work tolerance limitations report.[5] In *Samuel J. Russo*,[6] a wage-earning capacity determination was made in December 1972 without a current medical evaluation of appellant's work limitations, the most recent medical reports regarding appellant's physical limitations for work being made two years earlier in 1970.[7] The Board remanded the case for a medical evaluation of appellant's physical limitations for work and a medical opinion as to whether he was physically able to perform the duties of the designated position.

In the present case the Board finds that the Office determined appellant's loss of wage-earning capacity in a manner contrary to that set forth by the Board.[8] The Office failed to ensure that the record contained a detailed current description of appellant's disabled condition and ability to perform work. The Board notes that the only medical evidence included in the case record that could be considered reasonably current to the date of the Office's February 12, 1981 determination of appellant's loss of wage-earning capacity is the November 24, 1980 work restriction evaluation from Dr. Germond which was completed without the benefit of a concurrent physical examination of appellant and was not, therefore, based on current detailed findings. Because the report lacked any current detailed description of appellant's condition, it cannot form a valid basis for a loss of wage-earning capacity determination.

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[2] *See* 5 U.S.C. section 8115(a) (1-2).

[3] *See* 20 C.F.R. section 10.303(a).

[4] 32 ECAB 1878 (1981).

[5] *Id.* at 1882.

[6] 28 ECAB 43 (1976).

[7] *Id.* at 47.

[8] *See Warren A. Cook*, 34 ECAB 1535 (1983).

Additionally, the Board notes that the Office failed to follow its *Guidelines* set out in the Federal Employees' Compensation Act Programs Memorandum No. 77.[9]

The Board finds that the Office has failed to meet its burden of justifying a reduction in appellant's compensation benefits by failing to demonstrate that the selected sedentary position of order clerk fairly and reasonably represents his wage-earning capacity consistent with appellant's current work tolerance limitations.

The decision of the Office of Workers' Compensation Programs dated October 17, 1986 is hereby reversed.

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[9] *Mary A. Henson*, 36 ECAB 565 (1985). Federal Employee's Compensation Act Program Memorandum No. 77, as amended May 9, 1983, provides:

> "In determining the employees' loss of wage-earning capacity, the Office must take the following steps: (1) ensure that the record contains a detailed current description of the employee's ability to perform work in a disabled condition, including capacity to lift, stand, walk, etc.; (2) ensure that the record contains a complete description of all the duties of the offered position, and all its physical requirements; (3) ensure that the work offered to the claimant is consistent with the work capacity described in the medical report. If there is any question about compatibility, the case must be referred to the Office medical advisor or to the attending physician."

In the Matter of Grady N. Stallworth *and* Department of the Navy, Public Works Center, Pensacola, Fla.

Docket No. 88-81; Submitted on the Record;
Issued June 10, 1988

Before George E. Rivers, David S. Gerson, Willie T.C. Thomas

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of $13,958.75 occurred; (2) whether the Office properly determined that appellant was without fault in the creation of the overpayment and that therefore waiver of repayment was possible; (3) whether the Office abused its discretion in refusing to waive the overpayment; and (4) whether the Office properly required repayment at the rate of $400.00 per month.

This is appellant's second appeal before the Board. The factual history of the case is set forth in the Board's January 31, 1986 decision and is incorporated herein by reference.[1] In the prior appeal the Board found that the April 30, 1985 decision of the Office of Workers' Compensation Programs which determined that appellant had a 62 percent loss of wage-earning capacity based on his ability to perform the duties of a security guard was proper.[2]

By letter decision dated March 3, 1986 the Office advised appellant that the preliminary determination of overpayment of $195.75 for his receipt of temporary total disability instead of loss of wage-earning capacity benefits for the month of August, 1985, made by letter dated November 29, 1985 had become final, and that the overpayment would be recovered by the Office by withholding $25.00 every four weeks from his continuing compensation benefits.

By Form CA-1105 for election of benefits dated March 7, 1986 appellant elected to receive Civil Service Retirement Act benefits in preference to any benefits to which he was entitled under the Federal Employees' Compensation Act.

By letter dated April 15, 1986 the Office advised appellant that his election of benefits form had been forwarded to the Office of Personnel Management but reminded him that an overpayment balance of $195.75 was still outstanding. The Office requested that appellant either forward a check in the amount due or make arrangements for installment payments to the Office.

By letter dated April 30, 1986 the Office advised the Office of Personnel Management (hereinafter referred to as the OPM) that because appellant had elected to receive benefits provided by the U.S. Civil Service Retirement Act in lieu of compensation benefits, a reimbursement in the amount of $13,958.75 was due the Office for compensation paid from December 30, 1984, the effective date of election, through April 12, 1986, the date compensation was terminated.

By letter dated May 15, 1986 the OPM advised appellant that the annuity previously granted him on April 9, 1980 as a retired employee of the government had been restored, and that retroactively effective December 30, 1984 he had elected civil service annuity benefits in lieu of workers' compensation benefits. The OPM noted that the Office had requested reimbursement of $13,958.75 for compensation paid from December 30, 1984 and noted that OPM was suspending further action on the Office request for reimbursement pending "further clarification of the amount due and the period covered since no benefits were paid by this agency after July 30, 1985" when OPM received reimbursement from the Office of the $5,971.30 it had originally paid from December 30, 1984.

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[1] Docket No. 86-273 (issued January 31, 1986).

[2] Appellant was injured at work on May 31, 1976; he received temporary total disability for wage loss from July 16, 1976 through April 8, 1980. He received a schedule award for 79 percent impairment of the right upper extremity which was paid concurrently with his civil service retirement annuity and ran from April 9, 1980 through December 29, 1984. Appellant's retirement annuity continued to be paid through July 30, 1985.

By letter dated August 20, 1986 the Office advised appellant that a preliminary determination had been made that there was an overpayment in the amount of $13,958.75 because he had elected to receive a Civil Service annuity in lieu of compensation payments, including those payments already made, and OPM had restored annuity payments effective December 30, 1984, the retroactive effective date of appellant's May 7, 1985 election of loss of wage-earning capacity benefits in lieu of continued receipt of previously awarded annuity benefits; however, he had received compensation benefits until April 12, 1986 and receipt of dual benefits was prohibited. The Office advised appellant that a preliminary determination of fault had also been made and that appellant was at fault in the matter because he should have been aware that he could not receive both compensation and retirement benefits at the same time. The Office noted that the determination did not include the $195.75 [3] still outstanding from his prior overpayment.

By letter dated September 16, 1986 appellant requested a hearing on the issue of fault and waiver of the overpayment, and he submitted an OWCP Form 20 Overpayment Recovery Questionnaire.

By letter dated February 4, 1987 the Office noted that the OPM had paid appellant $14,461.20 gross for the period December 30, 1984 through May 30, 1986 and issued a check to appellant in the net amount of $9,092.44. The Office requested a copy of the explanatory letter accompanying the check that was sent to appellant.

By letter dated February 4, 1987 to the Office, OPM clarified that appellant received $13,102.90 gross amount of annuity for the period December 30, 1984 through April 12, 1986.

A hearing was held on July 21, 1987 and by decision dated and finalized September 25, 1987 the Office hearing representative affirmed and made final the Office's August 20, 1986 preliminary determination, finding that there had been an overpayment of compensation in the amount of $13,958.75. The Office hearing representative found, however, that appellant was without fault in the creation of the overpayment, but that circumstances did not justify waiver of recovery of the overpayment. The Office hearing representative based this finding on an analysis under section 8129(b) of the Act which provides that recovery of an overpayment may not be made when incorrect payment has been made to an individual who is without fault when recovery would defeat the purpose of the Act. He found that appellant and his wife had a combined monthly income of $1,844.00 and current monthly expenses of $1,061.25, excluding amounts for car maintenance, gasoline, clothing expense, medical expenses not covered by insurance, and miscellaneous household expenses. The hearing representative determined that the overpayment should be recovered by deducting $400.00 per month from appellant's retirement annuity which would allow appellant $1,444.00 to pay his claimed monthly expenses of $1,061.25 and his unclaimed expenses for car maintenance, gasoline, clothing, medical expenses not covered by insurance, and other miscellaneous expenses.

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[3] The Office letter incorrectly notes the amount of previous overpayment owed as $145.75 instead of $195.75, the actual amount of overpayment.

The Board finds that the Office properly determined that an overpayment in the amount of $13,958.75 occurred for the period December 30, 1984 through April 12, 1986, but that an overpayment in the amount of $195.75 remained from August 1985 when appellant erroneously received temporary total disability benefits rather than the correct amount, of which he had been informed, for loss of wage-earning capacity, for a total outstanding overpayment amount of $14,154.50 owed to the government.

The case record contains a February 28, 1986 final decision finding appellant at fault in the creation of the $195.75 overpayment due to the fact that he had been advised by letter dated April 30, 1985, four months before the overpayment occurred and a week before his election to receive loss of wage-earning capacity benefits in lieu of his retirement annuity, of the monthly amount of OWCP benefits at the loss of wage-earning capacity rate, and should have known or should have been expected to know that such rate was not the same rate he had received for temporary total disability. The Board finds that appellant had been adequately notified by Office letter that his rate of monthly compensation commencing August 1985 had been adjusted to reflect his loss of wage-earning capacity, and that his acceptance of benefits which he knew or should have known were erroneous rendered him not without fault with respect to the creation of the $195.75 overpayment for August 1985 and that therefore waiver of the $195.75 overpayment was not possible.

The case record demonstrates that, after receiving compensation for wage loss for temporary total disability from July 16, 1976 through April 8, 1980, appellant began receiving a schedule award for a 79 percent impairment of his right upper extremity concurrent with his civil service retirement annuity for the period April 9, 1980 through December 29, 1984 when his schedule award payments terminated. Appellant then received only his civil service retirement annuity until May 7, 1985 when appellant elected to receive loss of wage-earning capacity benefits made retroactive to December 30, 1984. Appellant's retirement annuity payments ceased July 30, 1985 and OPM sought and received reimbursement from the Office for $5,971.30 retirement benefits paid appellant by OPM for the period December 30, 1984 through July 30, 1985, a period of compensation now covered by the Office benefits figured at appellant's loss of wage-earning capacity benefits rate.

Appellant continued to receive benefits under the Act through April 12, 1986 when his re-election to receive OPM benefits became effective and retroactive to the original date of OPM retirement benefits termination of December 29, 1984.

Because appellant's benefits under the civil service retirement annuity program were made retroactive to the date of original termination and were calculated as $13,102.90 gross or $9,092,46 net benefits for that period, appellant was issued a lump sum check for that net amount. However, appellant had already received $13,958.75 benefits from the Office for the same period. This meant that appellant had received dual benefits for the same period which he knew or should have known was incorrect. When appellant re-elected to receive civil service benefits in lieu of benefits under the Act the Office sought reimbursement of dual benefits overpaid for that period which amounted to $13,958.75.

The Board notes that in determining whether an individual is "without fault," what constitutes "fault" depends on whether facts show that the incorrect payment resulted from: (1) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (2) Failure of the payee to furnish information which the payee knew or should have known to be material; (3) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect.[4]

The Board notes that at the time appellant accepted the compensation payments for wage loss from December 30, 1984 through

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[4] Federal (FECA) Procedure Manual, Chapter 2-901, paragraph 4(a). *See also Diane K. McColl*, 37 ECAB 574 (1986).

April 12, 1986 he had elected and was entitled to such benefits, and that therefore his subsequent election and acceptance of benefits from OPM during the same period of time cannot form the basis for finding him with fault in the creation of the resulting overpayment.

Because none of the above situations apply to appellant, and because, accordingly, appellant is without fault in the creation of the overpayment, the $13,958.75 overpayment may be considered for possible waiver.

However, the Board, in reviewing appellant's OWCP-20 and supporting documentation, notes that appellant and his wife have a monthly income of $1,844.00, that they claimed initially monthly expenses of $1,061.25, and that they subsequently claimed monthly expenses including medicine, dental care, eye exams and glasses, car insurance, personal insurance and cancer insurance, and allowable miscellaneous expenses, of approximately $268.36 per month, for total monthly expenses of $1,329.61. Subtracting allowable monthly expenses from total monthly income results in $514.39 per month over what is considered under 20 C.F.R. section 10.322[5] to be ordinary and necessary living expenses, and which is available for recovery of the overpayment.

The Board therefore finds that the Office did not abuse its discretion in refusing waiver of the overpayment and that recovery of the entire amount of overpayment will not defeat the purposes of the Act and would not be against equity and good conscience as determined under 20 C.F.R. section 10.323.[6]

The Board notes, however, that the Debt Collection Act of 1982[7] provides that debts owed to a federal agency may be collected by periodic offsets against the salary of a debtor who is employed by another federal agency. Deductions may be made from basic pay, special pay, incentive pay, retired pay, or other authorized pay or monies owed the debtor. The Department of Labor's regulations covering salary offset were published in the Federal Register on February 5, 1987 and became effective March 9, 1987.[8] Under the procedures established by the Debt Collection Act, collection techniques were developed for deducting from the current pay account of a federal employee or an authorized federal benefits recipient a "salary offset" when the employee owes money to the United States. In FECA Bulletin No. 87-35, the Office implemented the

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[5] *See* 20 C.F.R. section 10.322a(c)(1-5) (April 1, 1987).

[6] *Id.*, section 10.323(a).

[7] Debt Collection Act, 5 U.S.C. section 5511 *et seq.*, Pub. L. 97-365.

[8] 52 Fed. Reg. 3,772 (February 5, 1987) (to be modified at 29 C.F.R. Part 20).

Department's regulations to require other federal agencies to make regular deductions from the employee's or recipient's "salary" to satisfy an outstanding debt.[9]

The Board notes that decisions made by the Office pursuant to the Debt Collection Act are reviewable by the Office of the Administrative Law Judge under 29 C.F.R. Part 18. For this reason the Board does not have jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act as this involves an offset against the "salary" of a federal employee or benefits recipient as opposed to recovery made against continuing FECA benefits of an employee or authorized benefits recipient.

The Board, therefore, finds that with regard to the method of recovery under 29 C.F.R. Part 18, it does not have jurisdiction to consider the matter as the Board's jurisdiction is limited to appeals from final decisions of the Office arising under the Federal Employees' Compensation Act.[10]

The decision of the Office of Workers' Compensation Programs hearing representative dated and finalized September 25, 1987 is hereby affirmed.

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[9] FECA Bulletin No. 87-35 (issued April 24, 1987).

[10] *See* 20 C.F.R. section 501.2(c); *See also Jesse L. Green*, 39 ECAB 174 (1987).

In the Matter of CALVIN S. MAYS *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 87-347; Submitted on the Record;
Issued June 14, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's medical treatment for a urological condition effective August 15, 1985; and (2) whether the medical expenses incurred for surgical treatment of appellant's transurethral resection were for treatment of an employment-related condition.

On July 20, 1978, appellant, then a 28-year-old rigger, filed a claim alleging that he sustained a fractured pelvis on July 19, 1978 when he fell 30 feet onto a concrete floor from a submarine in dry dock that he was working on. Multiple fractures were diagnosed, including fracture of the right and left superior and inferior rami of the pubis, right carpal scaphoid, left first metacarpal, right transverse process of the fifth lumbar vertebra, fracture of the right side of the sacrum, chip fracture of the right lunate and right triquetrum, and fracture of the right wrist. The Office of Workers' Compensation Programs determined that all of the conditions above were employment-related, and appellant received appropriate compensation. Appellant returned to intermittent light duty on January 13, 1979; however, further light duty became unavailable, appellant's condition worsened over the year, and effective January 23, 1981, appellant's treating physicians found him to be totally disabled due to the injuries affecting appellant's lower back. On January 22, 1982, appellant elected to receive benefits under the retirement system of the Office of Personnel Management rather than compensation benefits for his loss of wage-earning capacity from the Office. Appellant had also received a schedule award for a 20 percent permanent loss of use of his right arm entitling him to 62.4 weeks of compensation from September 24, 1980 to December 4, 1981.

In form reports dated July 28, 1978, Dr. Richard Reiswig of the employing establishment diagnosed "fractures of right and left sides of pelvis; rule out paralytic ileus. Minimal trauma to the urogenital tract in the form of abrasions or tears." The same diagnosis was repeated by Dr. Colbert S. Davis, an orthopedist, in a report also dated July 28, 1978.

In a discharge summary dated August 11, 1978 following appellant's July 19, 1978 hospitalization, Dr. Davis noted that at the time of appellant's injury, appellant had sufficient bleeding from the urethra to have a urological workup to rule out tear or other serious urogenital injury requiring care. Following this, appellant had a catheter inserted and showed no further evidence of trauma.

In a report dated October 26, 1978, Dr. Lance Fogan, a Board-certified neurologist, noted that appellant complained of frequent impotence since his July 19, 1978 injury and that appellant complained of numbness in the scrotum and the tip of his penis.

In a form report dated April 3, 1979, Dr. John D. DiMichele, a Board-certified orthopedist, noted that appellant complained of continuous pain over the tip of the penis and neurological consultation was suggested for appellant's numbness of the penis.

In a report dated May 2, 1979, Dr. Dennis J. Beckley, a Board-certified neurologist, noted that appellant had recently developed additional problems with hesitancy and frequency of urination. He also recommended urological consultation and noted the following:

> "I believe that [appellant] had what was probably an injury to his cauda equina at the time of his pelvic fractures. His residual is apparently some numbness of the penis. Obviously the lower sacral roots are capable of working in that he is able to have relatively normal bowel function and some semblance of sexual function . . . .
>
> "I think whatever damage has been done has been done at this point and other than mild analgesics for back pain I can think of nothing neurologically that needs to be done."

In a form report dated July 18, 1979, Dr. Gerald H. Mahaffey, a Board-certified urologist, listed findings of slow urinary stream and poor erections, diagnosed "possible stricture urethra" and "possible pelvic nerve trauma," and checked "yes" to indicate that appellant's condition was due to the injury for which compensation was claimed.

In a form report dated September 7, 1979, Dr. Mahaffey noted that appellant had a slow urinary stream with a urinary tract infection, that he performed cystoscopy surgery and urethral dilation on August 14, 1979, that appellant's prognosis was good, and that appellant had a normal prostate and urethra. In a further report dated September 17, 1980, Dr. Mahaffey noted the following:

> "It was suspected that [appellant] might have a urethral stricture secondary to his old pelvic fracture. At the time of the cystoscopy we did not find a stricture. There was a mild bladder neck elevation but this was not occlusive.
>
> "Since [cystoscopy, appellant] urinates more freely. It would probably be of benefit to dilate him at periodic intervals . . . but at the present time his urinary status appears improved."

In a report dated September 24, 1980, Dr. DiMichele summarized the reports of Drs. Beckley and Mahaffey and diagnosed "residual numbness tip of the penis as result of cauda equina injury at the time of the original injury."

On January 22, 1981, an Office medical adviser reviewed the case record and noted that appellant's "dysuria" was "probably" related to the July 19, 1978 injury; he noted that while no stricture had been found on examination, appellant did have relief after the dilation.

By letter dated February 4, 1981, the Office informed appellant that his "condition of dysuria has been accepted as consequential to your July 19, 1978 injury, and bills for treatment of this condition have been paid."

On April 22, 1981, the Office noted that appellant had inquired about the possibility of schedule awards for his right leg and penis due to the injuries sustained on July 19, 1978.

In a report dated July 23, 1981, Dr. Mahaffey stated that he performed a dilation for appellant again on July 10, 1981, and he noted the following:

> "[Appellant] continues to have numbness on the . . . penis. He is able to have erections, but not as frequently as they were prior to the accident. His urinary stream is slow unless he receives a urethral dilation.
>
> "The slowness of the stream is again found to be due to the elevated bladder neck. There is no evidence of urethral stricture or disruption. He was again dilated and . . . his stream is markedly improved.
>
> "In view of the fact that he was voiding naturally prior to the accident and following the fractured pelvis with the development of pelvic hematoma which would surround the bladder, perhaps the fibrosis in the area of the bladder neck was accelerated. The patient would benefit from transurethral incisions of the bladder neck to relieve this obstructing element. This . . . however, . . . would not be compatible with getting his wife pregnant. In the interim, we have elected [periodic urethral dilations]."

In a report dated June 29, 1981, Dr. Beckley reiterated that he had diagnosed a residual spinal cord injury manifested mainly by a cauda equina syndrome with numbness in the sex organ on May 2, 1979. He also noted that at the present, appellant's sexual function was the same as before and that appellant was still having some problems with urinary hesitancy. On August 14, 1981, Dr. Beckley indicated that a recent CAT scan confirmed his belief that appellant did, in fact, sustain an injury to the cauda equina "and/or to the [spinal] cord at the time of his original injury."

By letter dated February 26, 1982, appellant was informed that with regard to his legs only, no schedule award could be issued until it was determined that he had reached the point of maximum medical improvement. Appellant was subsequently referred back to Dr. DiMichele for an opinion on the extent and degree of any remaining disability of the right leg, for schedule award purposes, as a result of the July 19, 1978 injury.[1]

On April 26, 1983, Dr. Mahaffey's office called the Office of Workers' Compensation Programs requesting authorization for surgery on the bladder. The compensation claims examiner informed the doctor's office that before any authorization could be given for such surgery, a medical report was necessary, and that it must describe the condition and the need for the surgery. Appellant also called the Office on April 26, 1983 and again the Office informed him that before any authorization could be given, a medical report was necessary.

In a report dated April 27, 1983, Dr. Mahaffey stated that he had performed a transurethral resection at the bladder neck that day and noted the following:

> "[Appellant's] urological residuals as a result of the [July 19, 1978] injury have been related [by Dr. Beckley] to recurrent slow urinary stream which has responded to urethral dilation. He also had a residual numbness of the tip of the penis. A cystoscopy done on 8-14-79 and again on 8-21-80 showed him to have a bladder neck elevation, but no evidence of stricture of the urethra. It was felt that the bladder neck obstruction had occurred as a result of some increase in fibrous tissue, possibly secondary to the injury. This symptom complex had not existed prior to the injury.
>
> "He was again cystoscoped on 7-10-81 and a normal urethrogram was found, but the cystoscopy revealed the bladder neck contracture was now an increase. . .
>
> "[Appellant's] symptoms have [now] become severe enough that he wishes to have the urinary tract problem resolved [through the transurethral resection, despite the fact that this would probably render appellant physiologically sterile]."

By letter dated May 4, 1983, the Office confirmed its prior telephone communications with appellant that bladder surgery could not be authorized as no report on appellant's bladder condition had been received since July 31, 1981. The Office then instructed appellant to submit a progress report covering the current bladder condition.

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[1] As no final Office decision has been issued on this matter or any other matter distinct from appellant's urological condition, this and other issues may not be addressed by the Board at this time. 20 C.F.R. section 501.2(c).

In a report dated May 16, 1983, Dr. Mahaffey noted that he had found a bladder neck contracture which restricted the flow of urine when he originally evaluated appellant in 1981. He added that he had also recommended the transurethral resection then, but that appellant declined to undergo such until April 27, 1983 when the discomfort became severe as appellant had been trying to impregnate his wife in the interim.

In a discharge summary dated May 19, 1983, Dr. Mahaffey diagnosed "bladder neck contracture, probably secondary to old pelvic injury."

In a report dated July 26, 1983, Dr. Mahaffey noted that despite the successful transurethral resection of April 27, 1983, appellant's urinary stream had now progressively regressed to its former state. Dr. Mahaffey added that, accordingly, a repeat cystoscopy had been scheduled for August 11, 1983.

In a report dated January 11, 1984, Dr. Stephen A. McGuire, a Board-certified neurologist, noted a "possible cauda equina syndrome" and bladder symptoms "consistent with the possibility of a distal cord lesion" for which appellant was at risk due to the previous trauma of the July 19, 1978 injury.

On June 3, 1984, an Office medical adviser reviewed the case record and noted with regard to appellant's bladder condition that he was "not personally convinced" that a "clear-cut relationship" between the work injury and the bladder problems had been established. He then recommended that appellant be referred to various specialists to determine what, if any, types of residuals remained from appellant's work injury.

By letter dated November 28, 1984, the Office referred appellant to a panel of medical specialists which included a psychiatrist, a neurologist, an orthopedist, a rehabilitation specialist, and a urologist.

A unified panel report was submitted on February 21, 1985, but in an attached report dated January 10, 1985, Dr. Roy Gryler, a Board-certified psychiatrist, noted the following:

> "There are indications from the history that Mr. Mays has always been a rather insecure and inadequate person with much underlying anxiety and vague, ill-defined phobias. This lifelong characterological trait may affect his present genitourinary symptoms and probably encourages the persistence of the symptomatology.
>
> "The claimant has a history of previous GU problems, just before going into the service and while in the service. This may

> explain the focus on his genitals and the persistence of the urinary symptoms at present."

Also in an attached report dated January 9, 1985, Dr. Frederick Newton, a Board-certified neurologist, noted that neurological examination showed signs which had been compatible with trauma to the cauda equina and noted that appellant had at one time been diagnosed as having suffered damage to the cauda equina which resulted in problems of sexual dysfunction and impaired penile sensation.

In an attached report dated January 11, 1985, Dr. Frederick Wood, the panel's Board-certified urologist, stated that appellant denied dysuria at the present time and noted the following:

> "DIAGNOSIS: NO EVIDENCE OF UROLOGIC DISEASE SECONDARY TO INJURY OF JULY 19, 1978.
>
> "DISCUSSION: Based on my physical examination, I am skeptical of the accuracy of the patient's self-reporting of sensory deficits in the penis and perineal areas. Objective reflex activity is normal.
>
> "It is certainly possible for pelvic fracture to cause urethral disruption and urethral stricture and impotence. However, the patient had a normal cystoscopy on August 14, 1979. I am aware of no way that a pelvic fracture would cause fibrosis of the bladder neck, as conjectured by Dr. Mahaffey. I do not believe that the patient's transurethral resections of the bladder neck had anything to do with his pelvic fracture injury."

In the panel report dated February 21, 1985, it was noted that:

> "The nature of the patient's complaints in the past, including . . . urinary difficulties has led to consideration of a cauda equina problem. Two electromyographic studies have been performed, the most recent of which was described as normal, whereas the initial study was interpreted as abnormal. Our review of that study does not indicate that the conclusion of abnormality was actually supported by the data set forth in the study. . . .
>
> "[C]omprehensive diagnostic reevaluation . . . did not show any evidence of disc herniation, spinal stenosis or other structural conditions that could affect the cauda equina. Cystometrogram and urologic evaluation failed to uncover any abnormalities involving the central or peripheral nervous system supply to the bladder.

> "When the negative results of these diagnostic studies are combined with the results of the clinical examinations, it becomes our consensus opinion that the patient does not have evidence of a chronic neuropathy from a cauda equina lesion. Rather, he has a multitude of subjective complaints which are unsupported by objective findings . . .
>
> "Subjective complaints include . . . difficulty with urination and impaired sensation. It should be noted that the physical examination does not reveal findings supporting the complaints; in fact, areas of sensory change do not follow recognized anatomic pathways."

By two-way message dated May 24, 1985, the Office informed appellant that "a decision regarding continuing payments of your urologic condition will be made as soon as possible; we will continue to pay for those bills until a final decision is issued."

By compensation order dated August 15, 1985, the Office rejected appellant's claim for compensation and medical treatment of his urological disease as of the date of the order. The Office found that the weight of medical opinion failed to establish that appellant's urological condition and subsequent surgery for transurethral resections of the bladder neck were causally related to the injury of July 19, 1978. In a separate memorandum to the Director of the Office with regard to this case, the Office also noted that Dr. Wood "had doubted" that appellant presently had any objective findings of any urethral disruption secondary to the injury.

By letter dated September 12, 1985, appellant requested a hearing which was held on February 15, 1986. At the hearing, appellant testified that he could not understand why the Office paid his bills for his urologic condition for seven years, including three surgical dilations, and why they were now terminating payment when his condition was largely the same. Appellant also inquired why one recent July, 1985 bill from his urologist would not be paid since it arose before the date of the August 15, 1985 compensation order, and the hearing representative informed appellant that it should have been paid had it in fact arisen before the date of the compensation order.

Appellant also submitted the December 13, 1985 report of Dr. Parviz Javaheri, a urologist, who noted a normal cystoscopy and a "functional obstruction external vesical sphincter post submarine accident 1978." In a letter dated February 11, 1986, however, appellant noted that Dr. Javaheri had stated that he could not go against Dr. Wood's report and that Dr. Javaheri had told appellant that he could not say what caused his problem.

In a report dated January 6, 1986, Dr. Mahaffey noted the following:

> "He has undergone cystoscopies to evaluate his urinary tract on several occasions. It was felt that because of the pelvic fracture, he might have developed a stricture, but no stricture was found. Cystoscopy was carried out which revealed a bladder neck contracture which was felt to be restricting the flow of urine. He did respond to urethral dilations with improved voiding only to have it subsequently slow down. . . . I initially felt that he would do well with transurethral incisions of the bladder neck. This was held off because . . . he did want to try to get his wife pregnant. . . . However, in April of 1983 he requested the incisions of the bladder neck. The operation was performed at that time and post-operatively he appeared to do reasonably well. His stream, however, had subsequently slowed down and he again had the superpubic aching.
>
> "In my initial discussion with Mr. Mays, I told him that I could not say definitely that the injury had caused his urologic symptoms, but that it certainly could be a possibility. There would be a certain amount of fibrosis that could take place due to the injury and the hematoma. In addition to this as late as 1984 he was found on neurological examination to have some evidence of cauda equina lesion."

In a hearing representative's decision dated August 14, 1986 and finalized that day, the Office affirmed its August 15, 1985 decision and found that the transurethral resection surgery of April 7, 1983 was not causally related to the July 19, 1978 injury and was not, therefore, a compensable medical expense.

The Board finds that the Office properly terminated appellant's medical treatment for a urological condition effective August 15, 1985.

Once the Office has accepted a claim and paid compensation for disability, it has the burden of justifying termination or modification of benefits. Under the circumstances, it must establish that its original determination was erroneous or that the employment-related disability has ceased.[2]

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[2] *Thomas Meyers*, 35 ECAB 381 (1983).

In this case, the record indicates that the Office terminated appellant's medical benefits on the ground that his urological condition was not employment-related. In this regard, the Board notes that the Office has met its burden of proof to terminate its acceptance of appellant's urological condition by establishing through the weight of the medical evidence that appellant had no current objective findings of an employment-related urologic condition underlying his continuing subjective complaints. This was the conclusion of Dr. Wood, a Board-certified urologist, and this conclusion was concurred in by the remaining members of the medical panel. None of the remaining medical evidence indicates that appellant had an employment-related urologic condition after August 15, 1985 and, in fact, does not adequately support the causal relationship of such a condition at any time. The Office had accepted the payment of treatment of appellant's "dysuria" based upon reports from Dr. Mahaffey which had originally diagnosed "possible stricture urethra" which was subsequently ruled out. In similarly speculative reports, Dr. Mahaffey later attributed appellant's difficulty to an elevated bladder neck which was "perhaps" due to an aggravated fibrosis in the bladder area that may have resulted from appellant's July 19, 1978 injury. However, as noted by Dr. Woods, Dr. Mahaffey failed to explain how a fibrosis as such would develop, if in fact it ever did. Further, Dr. Javaheri indicated that he concurred in Dr. Wood's opinion. Similarly, the reports of Drs. Beckley and McGuire are speculative in regard to their diagnoses of "possible cauda equina syndrome" with various residual symptoms, and were, therefore, insufficient to establish causal relationship.[3] Accordingly, the Office likewise met its burden to terminate by establishing that the medical evidence never supported causal relationship.[4]

The Board further finds that the medical evidence of record is not sufficient to establish that the medical expenses incurred for the surgical treatment of appellant's transurethral resection were for treatment of an employment-related condition. As noted above, Dr. Mahaffey originally diagnosed a "possible stricture" of the uretha and subsequently attributed appellant's condition to an elevated bladder neck which was "perhaps" related to fibrosis in the bladder area. The reports from Dr. Mahaffey do not provide a firm diagnosis of appellant's condition and his opinion on causal relation is, at best, speculative given the deficiencies of his reports as noted. Further, the record does not establish that appellant or Dr. Mahaffey sought any written authorization from the Office for the surgical resection prior to April 27, 1983.[5] The record reveals that the Office informed appellant authorization could not be given prior to receipt of a medical report. Moreover, there is no evidence of record that the surgery was performed for an existing emergency medical situation. In fact, appellant had chosen to delay the resection surgery for several years. The Board notes that in the absence of an emergency, an employee may not recover the costs of medical care obtained without prior approval by the Office.[6] Thus, the Office is under no obligation to pay these medical expenses.

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[3] *See William Joseph Lawson*, Docket No. 87-535 (issued April 16, 1987).

[4] *See Jack W. West*, 30 ECAB 909 (1979).

The decisions of the Office of Workers' Compensation Programs dated August 15, 1985 and August 14, 1986 are hereby affirmed.

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[5] *See* 20 C.F.R. section 10.402 and Federal (FECA) Procedure Manual, Chapter 3-300, Official Authorization for Examination and/or Treatment, Part 3—Medical. *See also George F. Rose*, Docket No. 87-1331 (issued August 25, 1987).

[6] *Louis G. Psyras*, 39 ECAB 264 (1987); *Manohar Singh*, 37 ECAB 821 (1986); *Mildred A. Lindall*, 35 ECAB 287 (1983).

In the Matter of Jerry C. Gilliam *and* Department of the Army, Military Department State of Oregon, Salem, Oreg.

Docket No. 87-1453; Submitted on the Record;
Issued June 15, 1988

Before George E. Rivers, Michele von Kelsch, Willie T.C. Thomas

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in rescinding appellant's compensation benefits.

On July 3, 1985 appellant, then a 44-year-old unit administrator, filed a claim for compensation alleging that he developed acute situational stress as a result of factors of his federal employment. Appellant stopped work on April 30, 1985 on sick leave status. Appellant remained on sick leave until he was terminated from his employment on June 20, 1985.

A requirement of appellant's job as a unit administrator at the Military Department, State of Oregon was to maintain satisfactory membership in the Oregon Army National Guard. He was required to spend one weekend per month on active duty and two weeks each year. The National Guard had a regulation, (AR-600-9), which required that military members maintain their weight within prescribed height and weight standards. For those who exceeded the proper weights, it established a maximum allowable body fat content. Soldiers who exceeded both were put on a weight program after evaluation by a medical professional. The soldiers then had six months in order to meet the weight loss amount established by the medical professional or be separated from the National Guard.

In a letter dated December 1, 1983 Major Mathew A. Thompson, the Battalion Executive Officer, informed appellant of the provisions of AR-600-9, including the fact that noncompliance would mean termination from his employment. As appellant did not meet the weight requirements during July 1983 weigh-ins he was given until February 1, 1984 to lose the weight. Major Thompson added that once the six-month period was over he would "be pressing units for discharge requests for full-time employees not in compliance with AR-600-9."

On January 5, 1985 appellant was placed on a weight-control program. He weighed 260 lbs., and his percentage of body fat was 32.1 percent. According to the standards imposed by AR-600-9, appellant's maximum allowable weight for a person of his age, sex and size was 239 lbs.; the percentage of allowable body fat was 26 percent. Appellant was required to lose 21 lbs. in six months (approximately three pounds a month).

On March 6, 1985 appellant signed a statement acknowledging that he understood his responsibilities to achieve maximum allowable weight, and that he understood that all favorable personnel actions were suspended until he was removed from the weight program. The record indicates that appellant did not lose the required weight.

On April 14, 1985, a Request Reevaluation, Notification to Commander and Notice of Separation was issued notifying appellant that, unless he could provide medical evidence indicating that he was overweight due to an underlying or associated disease process, he would be discharged on April 30, 1985.

On April 16, 1985 Edward R. Derrickson, LTCIN issued a Request for Discharge recommending that appellant be separated from the Oregon Army National Guard on the grounds that he exceeded height/weight standards during the period of July 1983 through March 1985 with every attempt made to counsel appellant and help him comply with AR-600-9. The Request for Discharge was approved that same day, and appellant was honorably discharged for failure to meet the standards of AR-600-9 effective April 30, 1985.

On April 30, 1985 appellant stopped work on a sick leave status.

Appellant was examined by a Dr. Karl LaRowe on May 1, 1985. Dr. LaRowe diagnosed appellant's condition as acute situational stress reaction and stated that he was totally disabled for the period May 1 through May 10, 1985. Appellant was subsequently examined by Dr. Barbara Keely Loeb, a clinical psychologist, on May 14 and May 29, 1984. Dr. Loeb also diagnosed appellant's condition as acute situational stress reaction and indicated that appellant was totally disabled through June 20, 1985.

On May 15, 1985 appellant was sent an Order indicating that he was honorably discharged from the Army National Guard effective May 15, 1985. Also on May 15, 1985 appellant was sent a 30-day notice of termination from his technician position. The letter explained that technicians employed in "Excepted Service" positions must be members of the National Guard. As appellant was discharged from the National Guard he must also be separated from his technician position.

By letter dated August 23, 1985 the Office of Workers' Compensation Programs informed appellant that he needed to submit additional evidence in support of his claim. Specifically, appellant was asked to submit a well-reasoned medical opinion establishing a causal relationship between his stress-related illness and factors of his federal employment.

In response to the Office's request appellant submitted a statement dated August 30, 1985 explaining why he believed his condition was related to his employment. Appellant alleged the following stressful factors: several letters by both Major Thompson and Major Tomasovic were given to him during civil service working hours concerning his weight; he received constant "harassment" by Majs. Thompson, Tomasovic, and Lt. Col. Derrickson concerning his weight loss; he was subjected to constant daily threats by management about losing his job; several of his duties were reassigned to other full-time employees; his superiors disregarded his union contract and refused him union representation; AR-600-9 was not uniformly enforced and management refused to help him lose weight, i.e., by not authorizing exercise equipment.

Appellant also submitted a report dated September 10, 1985 from Dr. Loeb which stated:

> "As I did not see [appellant] prior to his notice of dismissal, it is impossible for me to be certain that [his emotional condition was] not simply related to his dismissal . . .

By letter dated October 9, 1985 the Office explained that Dr. Loeb's report was insufficient to establish causal relationship and added:

> "* * * If as you stated you were required to lose weight in order to maintain your military position in the Guard, and the harassment centered around your losing weight in order to stay in the guard, how are you relating this to your job as a federal employee? In other words, how is this alleged harassment connected to your job as a Unit Administrator?"

On October 17, 1985 appellant responded that while a person could belong to the National Guard without being employed as a Unit Administrator it was impossible to be a Unit Administrator, without being a member of the National Guard. Appellant further stated that his condition was not only caused by harassment, but also by the stress he received as a result of his "combined position." Lastly, appellant stated that he received correspondence pertaining to his weight-control program during hours of his civilian employment.

In a report dated October 23, 1985 Dr. David Ruud, a psychiatrist, stated:

> "In regard to the etiology of [appellant's] condition, I feel his work situation was a definite contributing factor, without which his symptoms probably would not have developed. . . ."

By letter dated March 11, 1986 Major Tomasovic responded to appellant's allegations as follows:

> "The regulations concerning weight control are specific in nature and were followed with reference to [appellant]. [Appellant] was weighed only on Inactive Duty for Training (IDT) periods, *i.e.*, 'weekends.' [Appellant] was *not* reminded by management on a daily basis of the requirement to lose weight.
>
> "In regards to [appellant] statement, 'the constant daily threat to my job by management—if you don't lose weight you'll lose your job.' [Appellant] was treated in the same manner as all other full-time employees, both Active Guard/Reserve (AGR) and Technician. The Battalion had six (6) other

> employees on weight-control programs during the period [appellant] has referenced, to include other technicians. [Appellant] was treated on the exact same basis as the other individuals referenced.
>
> "[Appellant's] statement concerning correspondence on his weight given to him during hours of civil employment is accurate but misleading. Correspondence to all soldiers is posted on the date it is written. That is to say, we do not hold any mail for individuals until the weekend training period. Distribution is mailed directly to the individual concerned or placed in unit distribution, to be given directly to the individual. This procedure is standard throughout the National Guard and does not single out any soldier for differential treatment.
>
> "Discussions between [appellant] and myself concerning the weight-control program did occur during hours of civil employment. In all cases they were at the request, or instigation of [appellant] and not management.
>
> "In summation, it is the opinion that, representing management, I treated [appellant] in the same manner as all full-time employees. The weight control program is administered by the Unit Commander, not by management. As such my responses to [appellant] were management responses to keep the employee informed of his obligations and responsibilities to retain military membership."

In a report dated April 2, 1986 Dr. Loeb stated:

> "I would like to clarify for the record that [appellant] complained of a number of specific work factors that probably precipitated his acute stress reaction. The most significant appear to be the singling out for weigh-ins not required of others on the same weight-reduction program, and that he was subjected to discussions and observation during those days when he was on civilian rather than military employment. In addition, [appellant] discussed with me the lack of support he received in remedying his weight problems in terms of providing a specific program. It also seems that [appellant's] weight problem was a common and open subject of discussion among staff with no regard for confidentiality or privacy. Aside from the weight issue, [appellant] also complained that noncivilian personnel extended their authority to include his civilian responsibilities when there was no authority to do so.

> "I again support the idea that without the specific stressors mentioned above, [appellant] would probably not have suffered the acute stress reaction he did."

By letter dated April 4, 1986 appellant's employing establishment further stated:

> "It is our position that [appellant] has not been harassed or threatened in the administration of the weight-control program and that, if there was any harassment, which we dispute, it occurred during or as a result of [appellant's] military duty as a National Guardsman, not as a technician, and, therefore, his compensation benefits should be determined in accordance with military compensation law, not federal employee compensation law. The program was administered under the provisions of U.S. Army and Army National Guard regulations."

On May 9, 1986 an Office medical adviser reviewed the case record and concluded that appellant should undergo an impartial psychiatric evaluation. He determined that the impartial specialist should clarify whether appellant was experiencing stress due to the weight control mandate and the threat of imminent termination.

On June 10, 1986 the Office referred appellant, together with the case record and statement of accepted facts, to Dr. Elmore E. Duncan, a Board-certified psychiatrist, for an impartial evaluation.[1]

Dr. Duncan, in turn, referred appellant to Dr. Gregg F. Reiter, a clinical psychologist, for an evaluation. In a report dated August 5, 1986 Dr. Reiter stated that appellant's "termination, while possibly related to his weight, may have been due to his superior's inability to deal with his critical and rather rigid personality."

In a report dated August 25, 1986 Dr. Duncan concluded:

> "*Diagnosis:*
>
> Axis I: (1) 309.00 Adjustment Disorder with Depressed Mood.
> (2) 309.81 Post Traumatic Stress Disorder Delayed.
> Axis II: 301.40 Compulsive Personality.
> Axis III: Rule out Herniated Disc, recent, history of.
> Axis IV: Severity of social stressors code 5 major losses.

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[1] The Office originally referred appellant to Dr. Joseph D. Bloom, a Board-certified psychiatrist, for an evaluation. However, Dr. Bloom was unable to undertake the evaluation.

Axis V: Highest level of adaptive functioning in last year—level 4 fair moderate—impairment social and occupational functioning."

* * *

"The employment-related condition then, would be what the patient terms as harassment or constant reminding to lose weight, culminating in a threat to lose his job because of the weight, which was carried out as an actual termination from work, which apparently was June 15, 1985. The threat to his image as a good soldier and a Viet Nam veteran seriously eroded the patient's self-esteem and created anxiety because of his compulsive personality and his attempts to adhere to every sort of regulation. The actual threat and termination from military service aggravated a Post Traumatic Stress Disorder, Delayed which has never been treated. The Accepted Facts indicated that his work was generally satisfactory and when termination from his job became a reality in his mind, he was faced with not only the loss of his military career at which he spent long hours to the exclusion of personal hobbies and outside personal activities, he also suffered the loss of his retirement which he was within a year or two of achieving. What he perceived then, as harassment, and the failure of employee and employer to agree on a weight-loss program, and the resulting threat to his self-esteem and the actual tangible losses contributed to the mental problems as diagnosed."

* * *

"In my opinion [appellant's] symptoms and resulting disability were far greater than one would expect when a person is removed from duty for just cause. As noted above, it appears that underlying personality disorder of a compulsive type, which most of the time was adaptive to his work, but not adaptive to persons in authority, predisposed him to emotional disorder. He also has Post-Traumatic Stress Disorder, which was aggravated by the stress of losing his source of personal identity and self-esteem.

"In my opinion, such aggravation is temporary, and although the losses may be permanent, through adequate treatment and grieving process, the emotional disorder should be expected to resolve."

On October 1, 1986 the Office accepted appellant's claim for temporary aggravation of post-traumatic stress disorder and stated that appellant was entitled to compensation benefits from May 1, 1985 through October 1, 1985.

By letter dated October 27, 1987 appellant stated that he disagreed with the Office's decision and requested a hearing before an Office hearing representative. A hearing was held on January 22, 1987.

By decision dated and finalized April 8, 1987 the Office hearing representative found that appellant's emotional condition did not arise out of and in the course of appellant's civilian employment. The hearing representative explained that any emotional reaction to the weight requirement, weight-reduction program or termination because of his being overweight, was related to his military requirement and was not sufficiently related to his civilian duties to bring it within the coverage of the Federal Employees' Compensation Act. The acceptance of the case for temporary aggravation of post-traumatic stress disorder was rescinded.

The Board finds that the Office met its burden of proof in establishing that appellant's disability was not sustained in the performance of duty; and therefore was justified in rescinding appellant's compensation benefits.

Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation. This holds true where, as here, the Office later decides that it has erroneously accepted a claim.[2]

In the present case the Office originally accepted appellant's claim for temporary aggravation of a post-traumatic stress disorder. However, after further development of the record the Office established that appellant's emotional condition was not sustained in the performance of his civilian duties as a federal employee.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. Rather, "workmen's compensation is presently intended to provide coverage only for certain work-related conditions, not all of the workers' health problems." [3]

This Board has stated, in *Patrick O'Hara* [4] that the fact that an injury bears some relationship to an alleged requirement of appellant's employment is not sufficient in and of itself to find that the injury came within the purview of the Act. In *O'Hara* the appellant asserted that his injury which occurred while he was on annual active duty in the Army reserve occurred in the performance of his civilian employment with the Army because he was required to belong to the military reserve to retain his civilian employment. The case record contained a copy of an Army regulation effective after the date of appellant's injury which required the maintaining of membership in the military reserve as a condition of civilian employment.

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[2] *Walter Asberry, Jr.*, 36 ECAB 686 (1985).

[3] *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *Patrick O'Hara*, 34 ECAB 493 (1982).

The Board, after noting that a 1939 extension of benefits under the Federal Employees' Compensation Act to military reservists had been terminated for injuries occurring during or after 1957, found that appellant's "injury while on active duty in the Army reserve had an insufficient relation to the performance of his civilian duties to bring it within the coverage of the Act."

In the instant case appellant asserts that his emotional condition is causally related to the weight-control program imposed by AR-600-9 and his perceived harassment by superiors and co-workers in both his civilian and military positions as a result of his failing to comply with the weight restrictions imposed by AR-600-9. However, as both the weight requirement and the weight-control program were solely imposed by appellant's military employment, the resulting emotional condition "has an insufficient relation to the performance of his civilian duties to bring it within the coverage of the Act." The record contains no evidence that appellant was required, in his position as a Unit Administrator, to maintain a weight requirement. Appellant asserts that a requirement of his civilian employment was to belong to the National Guard, which in turn required him to meet the standards of the Army Weight Control Program. However, this Board has already stated in *O'Hara* that an injury resulting solely from active duty in the military reserve is not sufficiently related to an employee's civilian employment to be covered by the Act, even if appellant's civilian employment requires that he belong in the military.

Appellant tries to distinguish this case from *O'Hara* by stating that he was harassed by his civilian supervisors and co-workers on his civilian job. Appellant also explained that he received correspondence from his military supervisors concerning his weight requirements while on duty at his civilian job which he considered harassment. While the case record supports appellant's statement of the facts, this is not sufficient for him to be covered under the Act. This Board has held that the issue is not whether, in fact, there was harassment, but whether the employee's disabling emotional condition was precipitated or aggravated by the conditions of the employment.[5] Regardless of the frequency, nature, or substance of any such conversations or correspondence, the fact that they were about a program that did not have "sufficient relation to the performance of his civilian duties" would indicate that they would not be considered a condition of his employment. Any emotional reaction to such conversations would not arise out of and in the course of the claimant's civilian employment.

The decision of the Office of Workers' Compensation Programs dated and finalized April 8, 1987 is hereby affirmed.[6]

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[5] *Walter E. Tou*, 32 ECAB 1079 (1981).

[6] On appeal appellant's authorized representative asserts that the Office hearing representative acted improperly in deciding the case on the issue of performance of duty, when the only issue before the representative was whether appellant had any disability on or after October 1, 1985 causally related to factors of his federal employment. However, the Board has held that a hearing representative has *de novo* review of the case record and that he has the discretion to affirm, reverse, modify or remand the Office's decision. *Paul Ganelin*, 32 ECAB 1119 (1981). Therefore, the Office hearing representative properly raised the question of performance of duty, which was a relevant issue in this case.

In the Matter of JOSEPH R. ALSING *and* DEPARTMENT OF THE AIR FORCE, MATHER AIR FORCE BASE, Calif.

Docket No. 88-452; Submitted on the Record;
Issued June 17, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant was not entitled to medical benefits under the Federal Employees' Compensation Act after August 31, 1986; and (2) whether the Office's November 16, 1987 refusal to reopen appellant's case for further review on the merits of his claim for continuing compensation for disability constituted an abuse of discretion.

This case has previously been on appeal before the Board on two occasions. On the first appeal the Board, by a decision and order dated September 27, 1985, found that the impartial medical specialists resolving a conflict of medical opinion, Parnassus Heights Disability Consultants, based their opinion in part on an incorrect history of the treatment appellant received after his employment injury; the Board remanded the case to the Office for it to request a supplemental opinion from this group based on an accurate medical history, to have an Office medical consultant review a January 2, 1985 report from Dr. Taylor, appellant's attending physician, and to issue a *de novo* decision.[1] On the second appeal the Board, by a decision and order dated April 21, 1987, found that the weight of the medical evidence established that appellant had no disability causally related to the February 28, 1983 employment injury on or after August 31, 1986, basing this finding on a March 17, 1986 supplemental report from Parnassus Heights Disability Consultants, and on a May 12, 1986 report from Dr. Taylor which stated that appellant was capable of performing his usual work and was in fact working. The Board further found that the case was not in posture for decision concerning whether appellant was entitled to medical benefits of the Act for any employment-related condition, as distinguished from monetary benefits. The Board noted that the supplemental report dated March 17, 1986 from Parnassus Heights Disability Consultants expressed the opinion that appellant's 1983 employment injury caused a permanent aggravation of appellant's degenerative osteoarthritis of the spine, but did not provide medical rationale for this opinion. The Board further found it was improper for the Office to refer appellant to another impartial specialist, Dr. Koester, without attempting to obtain a supplemental report from the impartial medical specialists of Parnassus Heights Disability Consultants, and stated, "Since the report from Dr. Koester was improperly obtained, it will not be given any weight on review by the Board and should not be considered by the Office." The Board remanded the case to the Office for it to request the impartial specialists at Parnassus Heights Disability Consultants to submit an opinion setting forth their medical rationale to support their opinion that the employment injury caused a permanent aggravation of appellant's degenerative osteoarthritis of the spine, to be followed by a *de novo* decision concerning whether appellant was entitled to medical benefits of the Act.[2]

On remand, the Office, in a letter dated June 1, 1987, requested Parnassus Heights Disability Consultants to "rereview the file (with the exclusion of report dated 5-27-86 from Dr. Koester), statement of accepted facts, your previous report from 3/17/86 and submit a supplemental report providing your well-rationalized opinion in reference to why your group of specialists believe the employment injury from 2-28-83 caused a permanent aggravation to Mr. Alsing's underlying degenerative osteoarthritis of the spine."

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[1] Docket No. 85-1181.

[2] Docket No. 87-80.

The Parnassus Heights Disability Consultants submitted reports from Drs. Hopkins, Ho, and Clever, who were members of the panel that issued the March 17, 1986 and August 17, 1984 reports discussed on the prior appeals. The Parnassus Heights Disability Consultants also submitted a document titled "Medical file review," prepared by a registered nurse and consisting of a review of the medical reports submitted after the group's initial evaluation on August 17, 1984, including the May 27, 1986 report from Dr. Koester.

In an August 28, 1987 report Dr. Hopkins stated that appellant was disabled as a result of a degenerative spine condition and not as a result of his industrial injury, that his condition was the same as a result of the progression of his degenerative disease as it would be without the injury, that the temporary aggravation by the injury may have existed for up to six months, and that there was no evidence of permanent sequelae. Dr. Hopkins indicated he had reviewed the additional medical reports and that they did not alter his earlier impression.

In an August 28, 1987 report Dr. Clever stated that he had reviewed the August 8, 1987 medical file review from the registered nurse, that he did not see any facts that warranted the change in the panel's conclusion from temporary to permanent aggravation, and that there was no new information that would change the opinion from that presented in the August 17, 1984 report.

In a September 8, 1987 report Dr. Ho stated that the reports from Dr. Taylor and from Dr. Koester "were reviewed in great detail," that Dr. Taylor's additional report did not add new information or change his (Dr. Ho's) opinion, and that it was his opinion "that Dr. Koester's opinion of 27 May 1986 best reflects the opinion of this examiner. Furthermore, the Employees' Compensation Appeals Board Decision and Order of April 21, 1987 also felt that the weight of the medical evidence was represented by Dr. Koester's report."

By a compensation order dated October 23, 1987 the Office found that the weight of the medical evidence showed that appellant had no condition or disability causally related to the February 28, 1983 employment injury after August 31, 1986.

By a decision dated November 16, 1987 the Office found that the evidence submitted in support of appellant's request for reconsideration of the determination that his disability causally related to his February 28, 1983 employment injury ended by August 31, 1986 was of a repetitious nature and not sufficient to warrant review of the prior decision. This additional evidence consisted of an April 27, 1987 report from Dr. Taylor stating that the statement in his May 12, 1986 report that appellant was working and was fully recovered at that time was the result of a clerical error, and that the May 12, 1986 report should have stated that appellant was unable to return to work because he was permanently disabled. Dr. Taylor further stated that his medical opinion remained the same, namely that appellant was disabled for his former position of photographer by his need to use forearm crutches and by the limited amount of standing and walking he could perform, that he required ongoing medical care, and that 75 percent of his present disability was due to his February 28, 1983 employment injury.

The Board finds that the Office improperly found that appellant was not entitled to medical benefits under the Act after August 31, 1986.

On the prior appeal, the Board, by its decision and order dated April 21, 1987, found that the report from Dr. Koester was improperly obtained and should not be considered by the Office. Dr. Koester's report thus should have been excluded from the record in the manner described in FECA Bulletin No. 86-14.[3] Instead Dr. Koester's report was left in the record without any annotation that it should not be considered. As a result, Dr. Koester's improperly obtained report was reviewed by Drs. Hopkins, Clever, and Ho, the impartial medical specialists whose clarifying reports were obtained pursuant to the Board's decision and order dated April 21, 1987. Dr. Ho stated in his September 8, 1987 report that Dr. Koester's opinion best reflected his opinion, and indicated that he felt Dr. Koester's opinion constituted the weight of the medical evidence. Dr. Hopkins merely reiterated his opinion from a prior report, and Dr. Clever stated that the additional medical reports did not warrant the change in the panel's conclusion from temporary to permanent aggravation. As at least Dr. Ho and probably also Dr. Clever relied on the improperly obtained report of Dr. Koester in reaching their conclusions on the issue involved in this case, the reports from the impartial specialists at Parnassus Heights Disability Consultants obtained on remand are also "tainted" and cannot be considered on appeal.[4] For this reason the case

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[3] This bulletin states that improperly obtained medical evidence should be marked "Excluded" and the pages of the report be stapled together. This procedure was not followed with regard to Dr. Koester's report. The Office did, consistent with this bulletin, instruct the physicians at Parnassus Heights Disability Consultants to disregard Dr. Koester's report, but the physicians did not do so.

[4] *Aubrey Belnavis*, 37 ECAB 206 (1985). The Board noted that improperly obtained medical evidence was "to be annotated so that it is not considered in subsequent reviews of the evidence." The present case is distin-

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must be remanded to the Office for it to obtain a report from another impartial medical specialist not previously associated with the case to resolve the issue of whether appellant required medical treatment after August 31, 1986 for residuals of his February 28, 1983 employment injury.

The Board further finds that the Office's November 16, 1987 refusal to reopen appellant's case for further review on the merits of his claim for continuing compensation for disability constituted an abuse of discretion.

It is a fundamental principle of long standing that a claimant has a right under section 8128 of the Act to secure review by the adjudicating agency of a decision where he presents new evidence relevant to his contention that the decision is erroneous.[5] The presentation of such relevant new evidence creates "a necessity for review of the full case record; that is, all of the evidence, in order to properly determine whether the newly supplied evidence, considered with that previously in the record, shifted the weight of the evidence in such manner as to require a modification of the earlier decision." [6] If the Office should determine that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[7]

In the present case the Board, in its April 21, 1987 decision and order, relied in part on a May 21, 1986 report from Dr. Taylor stating appellant was working and was able to perform his regular work as the basis of the Board's finding that appellant had no disability causally related to his February 28, 1983 employment injury on or after August 31, 1986. In support of his request for reconsideration, appellant submitted an April 27, 1987 report from Dr. Taylor stating that the statement relied upon by the Board was made as a result of a clerical error and that his opinion was the opposite of that expressed in the May 12, 1986 report. The April 27, 1987 report was relevant to the issue on reconsideration and to appellant's contention that the Board's April 21, 1987 decision and order was erroneous. As such, it was sufficient to require that the Office review the case on the merits.

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guished from the situation in *Steven H. Pearlstein*, Docket No. 87-753 (issued September 30, 1987) where the report of an impartial medical specialist who reviewed an improperly obtained report was not excluded by the Board on the basis that the impartial medical specialist showed he clearly understood that the report was excluded and where the impartial specialist confirmed that he reached his well-reasoned conclusions solely on the basis of his own examination and without relying on the improperly obtained report.

[5] *Leonard E. Redway*, 28 ECAB 242 (1977) and cases cited therein.

[6] *Melvin C. Cox*, 1 ECAB 138 at 144-145 (1948).

[7] *Earl F. Smith*, 36 ECAB 261 (1984).

The decisions of the Office of Workers' Compensation Programs dated October 23, 1987 and November 16, 1987 are reversed and the case is remanded to the Office for further action consistent with this decision of the Board.

In the Matter of LOWELL SPICER *and* DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Brunswick, Maine

Docket No. 88-624; Submitted on the Record;
Issued June 20, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's disability beginning January 25, 1987 is causally related to his January 11, 1987 employment injury.

On March 13, 1987 appellant, then a 58-year-old heavy mobile equipment mechanic, filed a claim for cellulitis of the right leg which he attributed to an injury sustained on January 11, 1987 when he slipped on the step of a snowblower and banged the inside of his right leg on the step. Appellant stated that his leg did not hurt at the time he banged it on the step on January 11, 1987, that mechanics frequently bumped into something and kept on working if it did not hurt, that his leg started to hurt on January 24, 1987 at which time he called the doctor because he thought he had the flu and didn't feel too good, and that his leg gradually got worse resulting in hospitalization and surgery. Appellant stopped work on January 25, 1987. In response to an Office request for further information on his injury, appellant stated that on January 11, 1987 it was no more painful than a usual bump and that it was not until he became ill that he was aware it could be more serious.

The first medical care appellant received for his injury was on a January 24, 1987 visit from Dr. David Hill, a general practitioner, who initially believed appellant had phlebitis of the leg. Dr. Hill admitted appellant to the hospital on January 28, 1987 at which time he had a fever, and a rash on the right calf which was beginning to blister and appeared hemorrhagic. On admission the doctor set forth a history of slipping and striking his right calf on a truck 10 days ago. The redness and blistering began to advance up onto the thigh and Dr. Hill referred appellant to Dr. Paul Dumdey, a Board-certified internist, for a consultation. In a January 29, 1987 report Dr. Dumdey set forth a history that for some time appellant had sores on both legs, that on January 24, 1987 there was a sore on his right leg which may have been oozing a bit, that Dr. Hill prescribed an anti-inflammatory agent for what he felt was phlebitis, and that his leg reddened resulting in his admission to the hospital. Dr. Dumdey stated that on examination his right leg was diffusely swollen, had cellulitis changes, and had no palpable pulses. Dr. Dumdey diagnosed cellulitis in the right leg, and stated that if there was apparent progression to a necrotizing fasciitis surgery might be necessary. Appellant continued to have a fever despite his treatment at the hospital, and on January 31, 1987 Dr. Hill had him transferred to another hospital under the care of Dr. Michael Bach, who is Board-certified in internal medicine and infectious diseases.

In an admission report dated January 31, 1987 Dr. Bach stated that appellant was well until approximately a week ago when he developed generalized malaise, low grade fever, and an ill feeling, that he had pain on standing on his right leg and his wife noticed a reddened area on the right lower foreleg, that he was seen by Dr. Hill but continued to become worse with fevers, pains, and chills prompting his admission to the hospital on January 28, 1987 with increasingly severe redness and swelling of the right leg. Dr. Bach continued that appellant denied "any history of obvious trauma to the leg, although he does bump his leg intermittently while working. He does admit that earlier in the year around November he did slip down some stairs and bump his right leg. His wife tells me that he had a scab lesion at the upper end of his right tibia present but there was no inflammation around it." After describing appellant's findings on physical examination, Dr. Bach diagnosed "Probable streptococcal cellulitis and lymphangitis of the right leg. No evidence at this time for necrotizing fasciitis. I suspect part of the worsening of this infection is the prior therapy with anti-inflammatories which appear to aggravate an ongoing bacterial infection." In a discharge summary dated March 9, 1987 Dr. Bach stated that on February 17, 1987 a large amount of pus was discovered in the right calf and radical debridement of the fascia, fat and muscles of the calf was done, and that on February 26, 1987 split thickness skin grafting of the right foreleg was done by Dr. John A. Attwood, a general surgeon. Dr. Bach diagnosed "Streptococcal gangrene with necrotizing fasciitis of the soft tissues and fascia and muscles of the right foreleg."

In a March 24, 1987 report on a form of the Office of Workers' Compensation Programs Dr. Attwood diagnosed "ulcer right leg" and indicated by checking a box on the form that appellant's disability was related to his January 11, 1987 injury. In an April 1, 1987 report on an Office form Dr. Bach diagnosed necrotizing fasciitis and indicated by checking a box on the form that appellant's disability was related to his January 11, 1987 injury sustained by striking his lower leg against a snowblower. In a March 23, 1987 report on an Office form Dr. Hill diagnosed cellulitis, fasciitis, and hematoma of the right calf and indicated by checking a box on the form that appellant's disability was related to his January 11, 1987 injury sustained when he struck his leg on a truck bumper.

By a compensation order dated May 11, 1987 the Office rejected appellant's claim on the ground that he had not met his burden of proof by submitting sufficient reliable and probative evidence to establish the claim.

Appellant requested reconsideration and submitted a May 8, 1987 report from Dr. Attwood stating that after the skin grafts appellant had no further sepsis and that the grafts healed very nicely. Dr. Attwood concluded, "It appears as though the etiology of this incident was work related with a bump on the calf area which is somewhat unusual; however, in a diabetic, it is not beyond a possibility. There seems to be no other causes of this process and I do think his outcome will be reasonable."

By a decision dated July 24, 1987 the Office found that Dr. Attwood's May 8, 1987 report was insufficient to warrant the reopening of appellant's claim on its merits, because it was equivocal and failed to rationalize medically how the January 11, 1987 work incident resulted in the right leg condition.

Appellant requested reconsideration and submitted a July 28, 1987 report from Dr. Attwood stating, "It appears as though the etiology of the incident was a work-related calf injury which subsequently produced soft tissue death and secondary infection. Spontaneous sepsis without an etiological agent is extremely unusual. As you may know, Mr. Spicer is diabetic, and these forms of injuries are certainly not as well tolerated."

By a compensation order dated October 7, 1987 the Office found the additional evidence was not sufficient to warrant modification of the prior decision. In a letter accompanying the compensation order the Office stated, "The reason for this is that none of the evidence which you have submitted provides a well-reasoned medical opinion based upon a complete and accurate history to relate the condition for which you are seeking compensation to your federal employment."

Appellant requested reconsideration and submitted an October 26, 1987 report from Dr. Bach and an October 30, 1987 report from

Dr. Hill. Dr. Hill stated that when appellant was seen at home on January 24, 1987 he was "thought to have phlebitis of the right leg due to an injury which had occurred three days before. At the time of the house call the area of injury was a ⅓-inch scab over the upper shin area. There is no doubt at all that this patient's entire condition was due to his injury when he fell and hit his leg on his truck." In his report Dr. Bach stated:

> "There is no doubt in my mind that Mr. Spicer sustained his injury by bumping his leg on a snowblower while at work. There is a note in my admission history that he bumped his leg down some stairs at home, however, there is no way that his lesion could have been originating two months before his admission episode in January. He did tell me on his admission that he did bump his leg intermittently while getting in and out of his snow blower at work, and I feel quite confident that this, in fact, was the cause of his illness."

By a compensation order dated December 1, 1987 the Office found that the additional evidence was not sufficient to warrant modification of the prior decision.

The Board finds that appellant has established that his disability beginning January 25, 1987 is causally related to his January 11, 1987 employment injury.

Appellant's treating physicians, Drs. Hill, Attwood, and Bach, all attributed his right leg condition beginning January 25, 1987 to his employment injury. Dr. Attwood's reports were somewhat speculative, as they stated that it "appeared" that appellant's right leg condition for which he was hospitalized was related to his bump on the calf. Dr. Attwood also stated, however, that there seemed to be no other cause, that spontaneous sepsis without an etiological agent was extremely unusual, and that it appeared the work-related calf injury produced soft tissue death and secondary infection. Dr. Hill noted that when he initially saw appellant at home on January 24, 1987 he had a scab over the upper shin area, and concluded there was no doubt appellant's entire condition was due to his work injury when he struck his leg. Dr. Bach stated there was no doubt that appellant's leg condition was due to bumping his leg on a snowblower at work, and in his October 26, 1987 report stated that there was no way the bump on his leg appellant sustained at home in November 1986 as mentioned in his hospital discharge summary could have been the origin of his condition in January 1987. Although Dr. Hill in his admission note indicated the injury occurred about January 18, 1987 rather than January 11, 1987 and Dr. Bach's reports contained a history of a bump on the leg at work on an unspecified date, these discrepancies are too minor to affect the probative value of their reports, especially as their reports on Office forms contained the correct date of the injury and the doctors had an accurate description of the mechanism of the injury.

Although compensation awards must be based on evidence and not on mere speculation, surmise, or conjecture, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.[1] Although the evidence in the present case does not fit together so securely as to resolve the question of causal relation beyond all possible doubt, that degree of absolute certainty is not necessary, as the evidence, considered as a whole, leads to a sound, rational and logical conclusion that appellant's disability beginning January 25, 1987 is causally related to his January 11, 1987 employment injury. There is no medical evidence indicating that such a relation does not exist.[2]

The decisions of the Office of Workers' Compensation Programs dated May 11, 1987, July 24, 1987, October 7, 1987, and December 1, 1987 are reversed and the case remanded to the Office for payment of appropriate compensation benefits.

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[1] *Donald L. Morris*, 36 ECAB 140 (1984).

[2] *Sherwood R. McCartney*, 9 ECAB 129 (1956).

In the Matter of JACK JOHNSON *and* DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 87-1319; Submitted on the Record;
Issued June 21, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's claim for asbestosis is barred by the applicable time limitation provision of the Federal Employees' Compensation Act.

On July 7, 1986 appellant, then a 70-year-old retired sheetmetal worker, filed a claim for lung disease allegedly caused from exposure to asbestos during his federal employment aboard ships and in a shop. Appellant stated he first realized his condition was related to his employment in June, 1986 upon examination by Dr. Kenneth G. Torrington, Board-certified in pulmonary disease. Appellant had retired on November 3, 1959.

Employment records indicate that appellant had been exposed to a heavy concentration of asbestos from November 17, 1950 through November 3, 1959.

In September 1983 appellant was admitted to the emergency room of Magic Valley Regional Medical Center after 8 to 12 hours of severe anterior chest pain. While at the hospital appellant was examined by Dr. James F. Emery, Board-certified in internal medicine, who, in a medical report dated September 10, 1983 stated:

> "HISTORY OF PRESENT ILLNESS:
>
> "This pleasant 67-year-old . . . male gives me history of anginal type chest pains since the mid 1960's. These have been periodic and not been of great difficulty to him up until presently. Over the last two weeks he has overdone, not got enough rest he feels and, indeed, went out into the hills to get away from it all to rest but was kept awake by other campers and hunters. He began having rather severe chest discomfort the night prior to admission and then all through the night he had severe retrosternal discomfort. He denies any nausea or vomiting with this discomfort or increased dyspnea or diaphoresis, however, he said it was very severe, almost bad enough to bring him to the hospital and until this morning when it got bad again he stayed home. After approximately 8–12 hours of severe continuous chest pain he came to the emergency room and was seen. An EKG done at that time shows anterior wall acute myocardial infarction. He was given some Morphine sulfate for the discomfort and now feels much better and resting comfortably with only a mild amount of pain.
>
> "PAST MEDICAL HISTORY:
>
> "Patient has had chronic obstructive pulmonary disease in the past secondary to an asbestos exposure in the shipyards during the war. He also has rheumatoid arthritis and some mild gastritis periodically.
>
> "MEDICATIONS: Lanoxin 0.25 q day, ASA prn, arthritic pills of an uncertain type and an antacid.
>
> "ALLERGIES: *SULFA*, AND ALSO HAD A REACTION TO SOME TYPE OF GENERAL *ANESTHETIC* WHEN HE HAD HIS TEETH PULLED.
>
> "FAMILY HISTORY:
>
> "Negative.

> "SOCIAL HISTORY:
>
> "Patient stopped smoking and alcohol 20 years ago and has been healthy. He has been rather active and felt healthy over the last 3 years and he has not seen any physician over the past 3 years."
>
> * * *
>
> "LUNGS: Show decreased sounds bilaterally with a few crackles bilaterally. Chest x-ray showed no acute changes but the changes of the asbestos exposures.
>
> "CARDIOVASCULAR: Unremarkable PMI. S–1 was normal. S–2 had a loud pulmonary valve closure. There is a Grade II/VI systolic ejection murmur at the left sternal border at the apex, a loud S–4 gallop, no S–3, heart tones were rather good quality.
>
> "ABDOMEN: Obese without organomegaly, masses or tenderness.
>
> "GU: Deferred at this time.
>
> "EXTREMITIES: Symmetric without clubbing, cyanosis or edema.
>
> "NEUROLOGICAL: Normal. EKG shows an acute anterior myocardial infarction changes.
>
> "IMPRESSION:
>
> "Acute anterior wall M.I., however, rather late for Streptokinase and if given at this time will do more damage to the heart than any good. He is presently comfortable and no measurable cardiac congestive heart failure at this time. Will follow him conservatively."

In a report dated September 10, 1983 Dr. Sidney Henderson, a Board-certified radiologist, stated:

> "There appears to be some calcification of the diaphragmatic pleura. This finding is typically associated with asbestos exposure. There is extensive pleural thickening bilaterally which appears to be unchanged since the prior study. The heart is at the upper limits of normal in size for this technique. Extensive interstitial changes throughout the lung fields which, allowing for technical differences, appear unchanged. There is no evidence of new infiltrate or evidence of pulmonary venous congestion. In view of the pleural thickening and diaphragmatic calcification the possibility of asbestos exposure and mesothelioma should be considered.

> "IMPRESSION: ALLOWING FOR TECHNICAL DIFFERENCES THERE HAS BEEN NO CHANGE IN THE APPEARANCE OF THE CHEST. THERE ARE EXTENSIVE CHRONIC CHANGES WHICH RAISE THE POSSIBILITY OF ASBESTOSIS."

In a follow-up report dated September 18, 1983 Dr. Henderson stated:

> "The current study is compared to one of 9-10-83. Extensive interstitial and pleural changes are again visualized. Allowing for technical differences there has been no apparent change in the appearance of the lung field. Again, the possibility of asbestosis and/or mesothelioma should be considered in view of the calcification of the diaphragmatic pleura. Heart size is difficult to evaluate due to overlying pleural and lung changes. Overall there does appear to be slightly enlarged [sic]. Pulmonary vessels appear slightly engorged, but there is no evidence of pulmonary edema.
>
> "IMPRESSION:
>
> "(1) Extensive interstitial and pleural changes as previously noted.
>
> "(2) Cardiomegaly with no definite evidence of congestive heart failure."

On June 13, 1986 appellant sought treatment from Dr. Kenneth G. Torrington for an evaluation of asbestos-induced lung disease. In a medical report dated June 19, 1986 Dr. Torrington stated:

> "Mr. Johnson dates his respiratory problems to the 1950's when he developed a chronic cough. He was told that he had 'lung fibrosis' in approximately 1958. His symptoms have slowly progressed since that time, but have been significantly exacerbated in the past year."

* * *

> "On physical examination, the patient is a slightly overweight, well-developed man whose vital signs show a weight of 200 lbs., blood pressure 136/76, pulse 72 with occasional skips, and respiratory rate 20-22. HEENT exam shows that the tympanic membranes are obscured by cerumen. The patient wears full dentures. The neck exam is unremarkable. The lungs have markedly reduced breath sounds with bibasilar inspiratory

crackles. No wheezes are heard. Cardiac exam is unremarkable. The abdomen is soft without organomegaly or tenderness. The genitourinary exam reveals atrophic testicles bilaterally. There is moderate enlargement of the prostate without any nodularity. Extremities show no clubbing, cyanosis, edema, thrombophlebitis, and normal pulsations.

"A sputum examination is performed on an unstained specimen, but the sputum is thick and yellow, showing large numbers of polymorphonuclear leukocytes and occasional aveolar macrophages. No eosinophils are seen. Pulmonary function tests show a severe restrictive ventilatory defect. A copy of the pulmonary function tests is enclosed for your information. There is also a mild associated obstructive ventilatory defect. Chest x-ray was performed also at St. Luke's Hospital and showed changes suggesting reduced lung volumes with extensive bilateral calcification of pleural plaques, consistent with asbestosis. I compared these St. Luke's chest x-rays to films from Twin Falls from 1983, and see evidence of progressive pleural thickening bilaterally.

"In summary, medical diagnoses include (1) severe and extensive pulmonary asbestosis with a remarkable degree of pleural calcification and thickening. (2) Chronic obstructive lung disease of a mild degree. (3) Arteriosclerotic heart disease with prior myocardial infarction and current arrhythmias. (4) Rheumatoid arthritis, inactive. (5) Occasional esophageal spasms.

"It is apparent that the patient's dyspnea can be improved somewhat with the use of bronchodilator medications. For that reason, he has been started on an Alupent inhaler, which will improve him somewhat symptomatically. On the other hand, his asbestos-induced lung disease is severe and extensive, and will not respond at all to any form of therapy.

"I shall then turn to your specific questions. [From another physician not in the record]. (1) Obviously, the history of employment exposure is significant. (2) I have summarized the medical findings above. (3) My diagnoses are summarized above. (4) It is my opinion that Mr. Johnson's asbestos exposure at the Puget Sound Naval Shipyards unquestionably has caused him to develop pulmonary asbestosis. (5) Mr. Johnson suffers from a permanent impairment of the respiratory system. His limitation is in the severe range. According to AMA guidelines, Mr. Johnson falls into the group with Class IV severe impairment or worse. His history, physical findings,

> and pulmonary function tests substantiate that degree of impairment. (6) I believe that Mr. Johnson is permanently and totally disabled. This disability is clearly related to asbestos exposure at the shipyards. Although he does have a minor degree of chronic obstructive lung disease related to his prior smoking history and possibility of a severe episode of pneumonia as an adolescent, the asbestos-related restrictive lung disease has caused the vast majority of his pulmonary disability. (7) Finally, I would recommend that this patient receive treatment with inhaled and oral bronchodilators. He should be treated with antibiotics when he develops evidence of increasing purulence of the sputum. He should certainly be treated with a pneumococcal pneumonia vaccination as well as receive annual influenza vaccinations."

A radiologist report from Dr. Charles R. Carraslo, Board-certified in internal medicine, accompanied Dr. Torrington's report and states:

> "CLINICAL DATA: History of asbestosis.
>
> "FINDINGS: The musculoskeletal structures are unremarkable. There is extensive bilateral pleural thickening with calcified pleural plaques overlying both hemidiaphrams and left lateral pleural surface. These findings are diagnostic of asbestosis. Comparison with previous examinations would be useful to determine any interval change in the pleural atherosclerotic calcification involving the thoracic aorta. No confluent areas of infiltrate are demonstrated at this time.
>
> "CONCLUSION: Extensive bilateral pleural thickening and calcification compatible with asbestosis. See report above."

By letter dated December 10, 1986 the Office requested additional information from appellant regarding when and how he became aware of his disability and how it related to his federal employment.

By statement dated January 9, 1987 appellant responded to the Office's request for information and stated:

> "I have had some lung problems since approximately 1960 and they have gradually been getting worse. I have had terrible coughs and would get out of breath very easily. I have had medications for the coughs, but I have never been hospitalized because of them. In 1983 I had a heart attack and at that time my doctor noted I had a lung problem that he suspected might

> be asbestos related, but did not specify anything other than I should probably get a flu shot each fall. In January 1986 I became very ill with a bad cough and shortness of breath. My doctor suggested I see a lung specialist and I eventually went to see Dr. Torrington in June 1986. Dr. Torrington was the first person to tell me definitely that I had an asbestos-related lung problem. Dr. Torrington's medical report has previously been submitted."

In a letter dated February 5, 1987 the Office noted that appellant was aware in 1983 that Dr. Emery suspected an asbestos-related condition and, therefore, his time for filing a claim begun to run at that time. The Office found that the time limitation began to run no later than September 10, 1983 and appellant failed to file his notice of injury within the required one year time period. The Office advised appellant that he had thirty days to show that his untimely filing of written notice of injury was due to circumstances beyond his control or show sufficient cause or reason for failure to file.

In a statement dated February 13, 1987 appellant responded to the Office's February 5, 1987 letter stating:

> "I didn't file a claim when Dr. Emery suspected there might be a possibility of asbestos having something to do with my ongoing lung problems for several reasons. First, and most importantly, I didn't think one could or should file a claim simply because there was a suspicion that something at work had contributed to a problem you were having. Furthermore, the doctor wasn't concerned enough about his suspicion to tell me to see any other doctors, or to get any other tests to confirm or deny his suspicions. In fact, it was clear to me that all I had to do was get flu shots and that he didn't regard the problem as serious or that there was evidence that asbestos was causing a problem, rather than having a chronic cold-like problem. My wife and I felt that my breathing problems were probably an after effect of smoking.
>
> "As already noted in previous statements, I became very ill in 1986 with another cough and shortness of breath. It was only then that the doctor was concerned enough to suggest seeing a specialist, who then told me I had an asbestos-related problem. It was only then that I thought I had any basis for any claim."

By letter compensation order dated February 27, 1987 the Office of Workers' Compensation Programs rejected appellant's claim for failure to file a timely written notice of injury.

The Board finds that appellant's claim was timely filed.

Section 8122 of the Act, 5 U.S.C. section 8122 (1966), provides in cases of disease prior to September 7, 1974 that a claim for compensation be filed within one year of the date that the claimant was aware, or reasonably should have been aware, that the disabling condition may have been caused by factors of his employment.[1]

Appellant indicated on his claim form that he was aware of a relationship between his federal employment and his lung condition in June of 1986. The Board finds that appellant's statements taken as a whole, together with the other evidence in the case record, establish that appellant was not aware of the relationship between his exposure to asbestosis during his federal employment and his lung condition until his visit to Dr. Torrington in June of 1986.[2] Therefore his claim filed in July 1986, was timely filed. The Board is unconvinced that the September 10, 1983 report of Dr. James F. Emery in alluding to appellant's past abestos exposure, to wit: "patient has had chronic obstructive pulmonary disease in the past secondary to an abestos exposure in the shipyards during the war . . ." was sufficient to put appellant on notice of an asbestos-related condition acquired at the employing establishment during the years 1950 through 1959. This report was weighed in conjunction with the reason appellant was being evaluated in September 1983, his impression of what he thought his medical condition was at that time, as well as appellant's past medical and smoking history. The Board is unconvinced that appellant was aware, or reasonably should have been aware, by the September 1983 hospitalization for an acute, anterior wall myocardial infarction that he had acquired asbestosis at his federal employment during the period 1950 through 1959.

The February 27, 1987 decision of the Office of Workers' Compensation Programs is hereby reversed and the claim remanded for further action on the merits of appellant's claim.

Michele von Kelsch, Alternate Member, Dissenting:

The majority has subverted the law and overturned all Board precedents by accepting appellant's allegation that although he knew of a possible relationship between his condition and his employment, he need not file a claim until it has been demonstrated that it is "more probable than not" that the condition is employment-related. This new interpretation of the Federal Employees' Compensation Act (an act which is intended to be liberally construed), works a great hardship on all employees.

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[1] *See William Chambers*, Docket No. 86-131 (issued February 25, 1986). Appellant was exposed to asbestos prior to September 7, 1974 and therefore the one-year time limitation of 5 U.S.C. section 8122 (1966) applies.

[2] *See Nino V. Digrezio*, 33 ECAB 1435 (1982).

I, on the other hand, find that the law and Board precedent should be followed and thus time begins to run when an employee becomes aware, or reasonably should have been aware, of a possible, *not probable*, relationship between his condition and his employment. Thus, I would find that as acknowledged by appellant, he was aware of a possible relationship between his pulmonary condition and his asbestos exposure prior to 1983 and therefore his 1986 claim for asbestosis was not timely filed and therefore I must dissent from the majority.

Appellant was exposed to "heavy and primary" asbestos from 1950 to 1959 in his employment as a sheetmetal worker. Previously he had been a gunner's mate during the war years 1941 to 1945. He has acknowledged that his only exposure to asbestos was during his civilian employment at the shipyards.

In a September 10, 1983 report, Dr. James F. Emery related a "history taken from the patient himself" which revealed that "patient has had chronic obstructive pulmonary disease in the past secondary to an asbestos exposure in the shipyards during the war." Appellant's only exposure to asbestos in the shipyards was during his federal employment and appellant informed the doctor in 1983 of his pulmonary disease secondary to that asbestos exposure. This history taken from appellant by the doctor in September 1983 reveals that appellant was fully aware of his condition and its relationship to his employment before 1983.

This awareness of the disease and its possible employment relationship is explicitly acknowledged by appellant in his statements and his notes that his only exposure to asbestos was at the shipyards as a sheetmetal worker. He acknowledges that as early as 1958 he was informed he had "fibrosis." In a January 1987 statement appellant refers to his 1983 hospitalization and again reveals both his knowledge of the condition and its causal relationship to his employment. He states: "I have had some lung problems since approximately 1960 and they have gradually been getting worse. * * * In 1983 I had a heart attack and at that time my doctor noted that I had a lung problem that he suspected might be asbestos related . . ."

In point of fact appellant informed the doctor of his pulmonary disease and its relationship to his employment. He attempts to excuse his failure to timely file by stating that he "didn't file a claim when Dr. Emery [in 1983] suspected there might be a possibility of asbestos having something to do with my ongoing lung problems" . . . because "I didn't think one could, or should, file a claim simply because there was a suspicion that something at work had contributed to a problem you were having." Additionally, on appeal, appellant concedes that he knew prior to 1986 that there was a "possibility" of a work relation between his condition and his employment, but that a claim should only be filed when "more probably than not" there is a work relationship. The Federal Employees' Compensation Act, 5 U.S.C. section 8122 is very clear: in cases of latent disability time begins to run when an employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment. Appellant has demonstrated that he was aware of his condition and its possible employment relatedness prior to 1983. He has also conceded and acknowledged his awareness of a possible relationship. In countless cases the Board had ruled that the employee need only be aware of a "possible" relationship between the disease and the employment.[1] A corollary of the principle of "possibility" is that when an employee becomes aware or reasonably should have been aware that a condition has been adversely affected by factors of his employment, such awareness is competent to start the running of the time limitations period, even though he did not know the precise nature of the impairment or whether the ultimate result would be temporary or permanent.[2] Again, the corollary speaks to possibility not probability. Yet now the majority is overturning the law and all Board precedent that one need not file until it is "more probable than not" that the condition is employment related. This works a great hardship on all potential employees, and would have a definite chilling effect on all potential claims. I cannot condone such an interpretation.

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[1] *Anthony J. Pusateri*, 36 ECAB 283 (1984); *Joseph A. Cruz*, 35 ECAB 1085 (1984); *Joseph L. Osterhout*, 33 ECAB 1166 (1982); *Donald L. Keck*, 31 ECAB 994 (1980); *Phillip S. Thomas*, 27 ECAB 61 (1974); *Frederick Patrick Dooley*, 25 ECAB 3 (1973); *William H. Cole*, 22 ECAB 123 (1971); *Walter Denmon*, 22 ECAB 8 (1970); *Frederick F. Bloom*, 20 ECAB 356 (1969); *Gordon F. Burrow*, 20 ECAB 65 (1968); *Rudolph Vollert*, (Docket No. 87-1608, issued November 20, 1987).

[2] *Percy E. Rouse*, 26 ECAB 214 (1975).

In the Matter of Calvin W. Scott *and* Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Atlanta, Ga.

Docket No. 87-1469; Submitted on the Record;
Issued June 21, 1988

Before George E. Rivers, Michele von Kelsch, Willie T.C. Thomas

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined there was an overpayment of compensation in the amount of $188.06 during the period February 4, 1985 through September 27, 1986; and if so (2) whether the Office properly determined appellant was not "without fault" with respect to the overpayment during the period March 17, 1985 through September 27, 1986 in the amount of $175.17 and that therefore the overpayment was not subject to waiver; (3) whether the Office abused its discretion in refusing to waive the overpayment in the amount of $12.89 from the period February 4, 1985 through March 16, 1985; and (4) whether the Office properly withheld $188.06 from one month of appellant's continuing compensation to recover the overpayment.

On November 6, 1984 appellant, then a 32-year-old correctional officer, sustained a deep laceration of the left thigh when he was slashed with a razor blade by a prisoner. He stopped working that day, received continuation of pay from November 7 to December 21, 1984 and used sick leave from December 24, 1984 to February 2, 1985.[1] Appellant received temporary total disability from February 4, 1985 to January 8, 1986, a schedule award for an 11 percent permanent impairment of the left leg for the period January 9 to August 18, 1986 and temporary total disability compensation beginning August 19, 1986 and continuing.

On the reverse of one of appellant's claim forms which was filed on January 29, 1985 an employing establishment official stated that a "check of the employee's personnel file revealed that he does not have any health insurance benefits elected, and only has basic life insurance coverage." The official also answered "no" in response to the question on the claim form concerning whether appellant had any optional insurance effective February 4, 1984, the date his pay would stop.

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[1] Appellant subsequently bought back this sick leave and received compensation for this period.

On February 8, 1985 and March 13, 1985 the Office of Workers' Compensation Programs issued compensation checks for the periods February 4 to 19, 1985 and February 20 to March 16, 1985 respectively. Office worksheets in the case record indicate that no deductions were being made for optional life insurance premiums since the employing establishment had indicated appellant had not carried optional life insurance.

In a CA-1049 form letter dated March 29, 1985 the Office informed appellant that until further notice he would be paid compensation each four weeks under the conditions set forth in the letter and that if he had basic life insurance, such coverage would continue at no cost to him. The Office explained that appellant's first check on the periodic compensation rolls had been issued March 22, 1985, covered the period February 20 to March 16, 1985 and that the gross and net amounts of the check were $980.64 because there were zero deductions for health benefits and optional life insurance. The Office also explained that appellant's next check would be for a four week period beginning March 17, 1985 in the gross and net amount of $1,089.60 because no deductions were being made for health benefits or optional life insurance. On April 3, 1985 appellant signed and returned to the Office a portion of the March 29, 1985 letter signifying that he had read and understood the conditions under which he could receive compensation.

By letter dated April 1, 1985 the Office stated it had accepted appellant's claim for a laceration of the left leg and for depression, and reiterated that his next check would be for the period March 17, 1985 through April 13, 1985.

Appellant sent an undated certified letter to the Office, received on April 3, 1985, in which he stated the following: "I would like my records amended, and that my life insurance be deducted at the same rate and for the same amount of coverage I had in force prior to my injury and up to the time I went on workmen's compensation."

The Office replied to appellant by letter dated April 19, 1985 as follows:

> "You will continue to be protected by basic government life insurance coverage, without cost, as long as the OWCP benefits are being paid and you are unable to resume usual employment due to the injury. Only premiums for health insurance and optional life insurance are deducted from compensation payments."

By decision dated April 7, 1986 the Office granted appellant a schedule award for an eight percent permanent impairment of the left leg and informed him that "compensation payments [would] continue at present rate." The period of the schedule award was January 9, 1986 through June 19, 1986. An Office worksheet in the case record shows no deductions were made for optional life insurance.

Appellant requested a hearing before an Office hearing representative concerning his schedule award, asserted his compensation rate should be greater, and submitted two earnings statements from the employing establishment. One statement for the pay period ending November 24, 1984, during which appellant was in receipt of continuation of pay, shows that payroll deductions were being made for both regular and optional life insurance.

By letter dated July 7, 1986 the Office informed appellant that his temporary total disability would resume effective June 20, 1986 at the expiration of the schedule award and that the gross and net amounts of his regular compensation payments every four weeks would be $1,089.60 since there were zero deductions for health benefits and optional life insurance. The Office reiterated that "[i]f you have basic life insurance, coverage will be continued at no cost to you."

The case record contains a July 25, 1986 memorandum stating appellant had telephoned the Office to say he had had optional life insurance and that the Office had not made deductions for this since he had been on the compensation rolls.

In a July 30, 1986 order the Office found that case was not in posture for a hearing, set aside the April 7, 1986 schedule award decision, and remanded the case to the district office for the issuance of an amended schedule award for a total 11 percent permanent impairment of the left leg. On September 18, 1986 the Office issued the amended schedule award covering the period January 9, 1986 through August 18, 1986.

The case record contains an undated letter received July 28, 1986 in which appellant states he had tried to telephone the Office on July 7 and 25, 1986 after reviewing a March 1981 life insurance election form from his official personnel folder to inform the Office as follows:

> "I find that my employer, the Federal Bureau of Prisons, has failed to advise your office at the time of my injury that my life insurance contained optional coverage as reflected on the enclosed forms. Therefore, I [am] requesting that my insurance

> be changed to include the optional coverage that I requested initially in 1981. I understand and agree to pay any additional cost for this coverage."

The life insurance election form signed by appellant on March 8, 1981 and by an employing establishment official on March 30, 1981 states that appellant elected the basic life insurance and additional optional insurance.

By letter dated September 18, 1986 the Office informed appellant that "[s]ince your agency advised that you only had *basic* life insurance coverage, we have never made any *optional* insurance deductions from your compensation." The Office obtained from the employing establishment a copy of appellant's most recent life insurance election form, which was the March 1981 form, and verified that appellant had elected optional life insurance.

By letter dated November 4, 1986 the Office informed appellant it had made a preliminary determination that there was an overpayment of compensation in his case in the amount of $195.15 which occurred because "no optional life insurance premiums were withheld during the period February 4, 1985 to September 27, 1986." The Office stated it had made a preliminary finding that appellant was at fault in this matter because "[y]our telephone call to this office on July 25, 1986 indicated that you were aware that you owed premiums for optional life insurance coverage." The Office informed appellant of his right to a prerecoupment hearing and explained that overpayments are not collected when it can be shown that the claimant was not at fault and when recovery would defeat the purpose of the Federal Employees' Compensation Act or be against equity and good conscience. The Office explained these standards for appellant and requested he submit financial information including an overpayment questionnaire which would be used to determine whether to waive the overpayment if the preliminary finding of fault were overturned or used to decide how to recover the overpayment if the preliminary finding of fault were upheld. An Office worksheet shows the Office began deducting optional life insurance premiums effective September 28, 1986.

Appellant replied on November 9, 1986 that he wanted a prerecoupment hearing and asserted the employing establishment, not he, was at fault because the former had provided incorrect information to the Office concerning optional life insurance. Appellant stated that the conditions under which he could receive compensation were "never" explained to him, that "I only received my award letter and no additional information concerning my rights and responsibility for reporting information." Appellant asserted there was no overpayment because it appeared he had not been covered by optional life insurance for the past two years and since he had not been covered, he owed no past premiums.

Appellant completed the overpayment questionnaire on November 9, 1986 stating his monthly income, including his workers' compensation benefits and his wife's earnings, was $3,389.00 while his monthly expenses totalled $3,004.00. Appellant further stated his total funds equalled $30.15 including a $26.00 checking account balance and a $4.15 savings account balance, that he owned no stocks or bonds, valuable property or real estate not counting his home, family car or household furnishings. Appellant subsequently withdrew his hearing request.

By decision dated April 8, 1987 the Office determined there had been an overpayment of compensation in the recalculated amount of $188.06 because premiums for optional life insurance were not deducted from appellant's compensation for the period "February 4, 1985 through July 31, 1986 (543) days at the rate of $8.80 each 28 days," or $170.66, and at the rate of $8.40 each 28 days during the period August 1, 1986 through September 27, 1986, or 58 days, amounting to $17.40, or a total of $188.06. The Office determined that appellant was without fault concerning the overpayment of compensation for the period February 4, 1985 through March 16, 1985 in the amount of $12.89 because there was no evidence that when he received these checks dated February 19 and March 22, 1985 respectively that he was aware that deductions for optional life insurance had not been made. The Office further determined that appellant was not without fault for the balance of the overpayment during the period March 17, 1985 through September 27, 1986, with compensation checks dated April 13, 1985 and every 28 days thereafter, because on March 29, 1985 he was sent an Office letter which showed no deductions were being made from his compensation for optional life insurance premiums. The Office also stated that its April 19, 1985 letter provided general information about basic and optional life insurance and "stated that although no deductions are made from a claimant's compensation for basic life insurance, premiums must be deducted if the claimant has optional life insurance coverage." The Office concluded the evidence established appellant was aware or reasonably should have been aware that he received additional compensation to which he was not entitled from March 17, 1985 through September 27, 1986, was therefore not without fault, and the overpayment could not be waived.[2]

Concerning the $12.89 overpayment for which appellant was without fault, the Office denied waiver on the grounds that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience. The Office concluded that appellant's financial information showed discretionary income of $385.00 per month (monthly income minus monthly expenses), that he did not need substantially all his income to meet his ordinary and necessary living expenses and that therefore recovery of the overpayment would not defeat the purpose of the Act. The Office further concluded that collection of the overpayment would not be against equity and good conscience because appellant had submitted no evidence or argument to establish that repayment of the $12.89 would cause financial hardship or that he detrimentally relied upon the incorrectly paid $12.89 of compensation.

The Office determined that because appellant had discretionary monthly income of $385.00 it was reasonable to collect the entire overpayment of $188.06 from one of appellant's periodic compensation payments.

The Board finds that the Office properly determined there was an overpayment of compensation in the amount of $188.06 during the period February 4, 1985 through September 27, 1986.

An employee who is already enrolled in the basic life insurance program is entitled to continued coverage at no cost to the employee while he or she is receiving compensation.[3] An employee already enrolled in an optional life insurance program may retain such optional life insurance while receiving compensation if he or she is eligible to continue regular insurance and has had optional life insurance for no less than the five years of service immediately preceding the disability or the full period or periods of service during which optional life insurance was available, if less than five years.[4] Premiums for optional life insurance are withheld from the employee's compensation payments.[5] When an underwithholding of life insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to the Office of Personnel Management when the error is discovered.[6] Concerning whether the Office can recover the overpayment of compensation from the employee, the overpayment is subject to the waiver provisions of 5 U.S.C. section 8129, as well as to other statutes and regulations relative to overpayments and collections of debts.[7]

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[2] In portions of its decision the Office incorrectly identified the period of the overpayment as February 4, 1985 to November 27, 1986 instead of February 4, 1985 to September 27, 1985.

[3] Federal (FECA) Procedure Manual, Chapter 5-400, Health Benefits and Optional Life Insurance paragraph 10(a) (December 1984).

[4] *Id.*

[5] Federal (FECA) Procedure Manual Chapter 5-400, Health Benefits and Optional Life Insurance, paragraph 11(b) (December 1984); FECA Bulletin No. 85-31 (issued June 4, 1985).

In the instant case, when the Office did not make deductions for optional life insurance premiums based on the incorrect information it had received from the employing establishment, there was an underwithholding of optional life insurance premiums for the period February 4, 1985 through September 27, 1986.[8] Pursuant to FECA Bulletin No. 85-31 an overpayment of compensation in the full amount of the optional life insurance premiums payable by appellant, $188.06, was created.

The Board further finds however that appellant was "without fault" with respect to the overpayment of compensation during the period March 17, 1985 through September 27, 1986 in the amount of $175.17.

The Federal Employees' Compensation Act, section 8129(b), states that: "adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[9] Conversely, no waiver of an overpayment is possible if the claimant is with fault in the creation of the overpayment.[10]

In determining whether an individual is "without fault," what constitutes fault depends on whether the facts show that incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[11]

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[6] Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments, paragraph 7 (September 1986); FECA Bulletin No. 85-31 (issued June 4, 1985).

[7] FECA Bulletin No. 85-31 (issued June 4, 1985).

[8] *See William Phillips, Jr.*, 39 ECAB 330 (1987).

[9] 5 U.S.C. section 8129(b).

[10] *Mary Valentine*, 33 ECAB 1419 (1982).

[11] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545 (1979), the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901, Overpayment, Part 2 claims.

In the present case, it is apparent that the Office applied the third standard, acceptance of a payment which the payee either knew or should have known was incorrect, in finding appellant was at fault in the creation of the $175.17 overpayment for the period March 17, 1985 through September 27, 1986.

Based on erroneous information from the employing establishment that appellant had only basic and not optional life insurance at the time his pay stopped following his injury, the Office made no deductions for optional life insurance. By letter dated March 29, 1985 the Office informed appellant of the conditions under which he would receive compensation every four weeks and stated that if he had basic life insurance, such coverage would continue at no cost to him. The letter showed that the gross and net amounts of appellant's monthly compensation were the same because no deductions were being made for optional life insurance or health benefits.[12]

The certified letter from appellant received by the Office on April 3, 1985 shows that appellant was aware of an error in that he asked the Office to "amend" his records and to start to make deductions for "life insurance . . . at the same rate and for the same amount of coverage I had in force prior to my injury and up to the time I went on workmen's compensation." The Office did not investigate appellant's life insurance status further and merely reiterated to appellant on April 19, 1985 that he would continue to be protected by basic life insurance at no cost to him and that it was only premiums for optional life insurance (which the employing establishment had reported appellant had not had) which were deducted for compensation payments. Rather than establishing that appellant had accepted a payment which he knew or should have known was incorrect, these letters support appellant's assertions that he believed he was not covered by optional life insurance during this period since the Office had made no deductions for optional life insurance premiums from his compensation payments and that since he was not covered during this period, the amounts of the compensation payments he received were correct. This is further supported by appellant's attempts in July 1986 to notify the Office again that he had had optional life insurance while employed, that the Office had not made deductions for this from his compensation payments, and that he wanted the Office to "change" his coverage to start the optional life insurance coverage.

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[12] The employing establishment had correctly notified the Office that appellant had not had health insurance while employed.

Appellant was aware he would have to pay an additional cost to start and continue the optional life coverage. There is no indication, however, in the record that appellant was aware that because the Office failed to withhold optional life insurance premiums from March 17, 1985 through September 27, 1986, the Office is required to deem the entire amount of the premiums an overpayment which the Office must pay to the Office of Personnel Management to ensure that appellant had proper coverage by optional life insurance during the entire time he was on compensation. There is no evidence in the case record that appellant accepted payments which he knew or should have known were incorrect since appellant reasonably believed that during the periods when optional life insurance premiums were not deducted, he was not covered by optional life insurance.

Since appellant is without fault with respect to the overpayment of compensation for the period March 17, 1985 through September 27, 1986 and for the period February 4, 1985 through March 16, 1985, the case will be remanded to the Office for it to consider whether the entire overpayment in the amount of $188.06 should be waived and if not, how the overpayment should be recovered. After any further development deemed necessary by the Office, the Office should issue a *de novo* decision on this aspect of the case.

The April 7, 1986 decision of the Office is hereby affirmed insofar as it found there is an overpayment of compensation in the amount of $188.06 during the period February 4, 1985 through September 27, 1986; the April 7, 1986 Office decision is hereby reversed insofar as it found appellant was not "without fault" with respect to the overpayment of compensation during the period March 17, 1985 through September 27, 1986 in the amount of $175.17; the April 7, 1986 Office decision is set aside insofar as it refused to waive the overpayment of compensation and recovered the entire amount of the overpayment from one month of appellant's continuing compensation. The case is remanded to the Office for further development and a *de novo* decision concerning waiver of the overpayment and any recovery.

In the Matter of CARLA E. PHILLIPS *and* U.S. POSTAL SERVICE, POST OFFICE, Oklahoma City, Okla.

Docket No. 88-87; Submitted on the Record;
Issued June 22, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant's emotional condition commencing August 20, 1986 due to the shooting death of her husband was sustained in the performance of duty.

On August 28, 1986 appellant, then a 37-year-old distribution clerk, filed a claim for mental and emotional stress commencing August 20, 1986 due to the shooting death of her husband that date at the Edmond, Oklahoma branch of the employing establishment. Appellant was on her way to her job at the Oklahoma City branch of the employing establishment at the time of the shooting; after later learning of her husband's death she stopped work that date, received continuation of pay through October 4, 1986 and took leave thereafter.

By CA-20 attending physician's report dated September 2, 1986 Dr. Gregory P. Kelley, an osteopath, noted that he treated appellant on August 29, 1986 for diagnosed depression and anxiety. He opined that appellant was not able to return to work at that time and noted that she was to be referred to a psychologist or psychiatrist for further evaluation.

By report that same date Dr. Kelley noted that since the time of the incident appellant felt that she could not go anywhere near the Edmond branch of the employing establishment, that she panicked when she got close to it, and that she was afraid to travel to the other side of the city due to her feelings. Dr. Kelley also noted that appellant was experiencing guilt because she was the one who suggested that her husband take the job at the Edmond branch; he noted that appellant was having trouble sleeping and caring for her two sons.

On September 10, 1986 the employing establishment advised the Office of Workers' Compensation Programs that appellant was not an employee of the Edmond branch at the time of the incident but was on duty at her permanent duty station in Oklahoma City. On September 12, 1986 the employing establishment reported that appellant was transported from her permanent duty station at the Oklahoma City branch to the Edmond municipal building near the employing establishment branch about three hours after the shooting and was informed of her husband's death after she arrived.

By letter dated September 22, 1986 the employing establishment advised appellant that continuation of pay had been granted as a result of her on-the-job injury and subsequent absence from work.

On September 26, 1986 the employing establishment advised the Office that appellant had been taken to a building three blocks away from the site of the murders and that that was the place where she alleged her injury occurred.

By compensation order dated September 30, 1986 the Office rejected appellant's claim finding that the evidence failed to establish that appellant sustained an injury due to her job duties while in the performance of duty on August 20, 1986.

By letter dated October 8, 1986 appellant requested a hearing under section 8124(b)(1) of the Act.

In support of her request appellant submitted a November 3, 1986 report from Dr. Joan L. Webb, a Board-certified psychiatrist, who noted that appellant had been in treatment since the August 20, 1986 murders, and noted as follows:

> "[Appellant] is experiencing an acute reaction of distress as a result of the trauma of hearing of the shootings and knowing her husband was a possible victim while she herself was on the job as a postal employee, and then being taken to the Edmond Municipal Building by her Station Manager as directed by the management. She witnessed the distress of the Edmond Postal employees while herself being informed of her husband's death. This combination of the violent nature of the death of her husband while he was a postal employee and being taken to the scene of the violence is particularly traumatic and unusual. The recovery time needed for this extended and complicated trauma may be much longer than for less complicated trauma."

By report dated December 1, 1986 Dr. Webb noted as follows:

> "It is suggested that [appellant] return to work in a step-by-step manner so that she resumes her duties in increasing increments. At first, it would be helpful if she were in a low key, low stress job up to six hours a day and did not have night or weekend duties due to the hardships it would place on her children who are adjusting to the loss of their father. Also, it would be helpful if she were exposed to reminders of the trage-

> dy such as jeeps, station atmosphere, cases, and carriers in uniform in small increasing amounts. It is anticipated that such reminders will cause anxiety and tearfulness, but this will gradually subside with time and understanding. [Appellant] will be able to return to work on a full time, unlimited basis within a short time."

Appellant also submitted a statement of events on August 20, 1986 which noted in part as follows:

> "At approximately 7:50-7:55, I was driving west . . . when there was a newsbreak on the radio telling of a shooting at the Edmond Post Office with a possible hostage situation. It also said that police there had cordoned off a 5-6 block area. I fell apart emotionally and pulled off out of traffic. . . . I had to decide whether to go to Edmond (North) or South to work and wait on a call. . . . I knew of a truck stop where . . . I would be able to call work and tell them I would be late and was a wreck and find out what information they had.
>
> "The supervisor who answered the phone, Wendy Ratliff, said they knew the incident had happened but had no particulars and commented that they should have called me at home before I left, but hadn't. I drove on in to work and at their suggestion went into a small locker room off the women's restroom to wait for more news and get myself together so the entire building wouldn't wonder why I was a wreck today. I waited there approximately 30 minutes when Alan McManes, the station manager, sent word back with Wendy Ratliff . . . that the police had rushed the Edmond Post Office building and it was over. Alan had been in touch with management in the Oklahoma City offices and had the information that one person was dead and seven were injured and that Lee's name was not on the list.
>
> "Much relieved, I clocked in around 9:00 a.m. and began casing first class letter mail. As time passed I became some concerned that Lee hadn't called to tell me he was o.k. . . . A short while later, approximately 9:30 a.m., letter carriers with radios on started saying that the news was reporting more and more dead, finally up to 14-15. I once again fell apart and Alan called downtown to the main post office to inquire about the news story and was told by Calvin Gould, a management official, 'it was bad' and 'you'd better get her up to Edmond now.' Alan drove me to Edmond immediately. As I was leaving

the building I realized I had not clocked off and started in that direction but Alan (station manager) said to 'forget that, downtown had said we need to get up there as soon as possible.' We left approximately 9:40 a.m.

"Upon arriving in Edmond . . . Alan seemed to know right where to take me and drove me to a city building, the administration building, where chaos reigned with postal people and their families milling around and being reunited, news crews to try to get around and through, *etc*. . . . Lee was nowhere to be seen. We rushed into the building where people were also gathered in an entryway (no Lee) but saw and headed into an auditorium which was pretty well full of people awaiting news. Lee was not present but [I] saw other post office people I knew. . . . A woman at a table in the front of the room had a list of some kind with survivors and people accounted for. Lee's name was not on it but she said that there were employees . . . still being interviewed and a team of postal officials (inspectors) was to come soon with a list of the dead. When they arrived they set up in a small chamber room off the front of the auditorium and we went in to tell who we were worried about and they would tell us if that person was o.k. or not. I had arrived to a relatively full room of people so ended up in a front row seat and was first to be sent through the room. Their 'we're sorry' caused a 'NO! NO! NO! Are you sure? Are you sure?' reaction from me which you can find quoted in the Daily Oklahoma, August 21.

"We were immediately taken by a minister to a small room where they tried to help us to accept this nightmare, control our emotions, and make calls which were almost impossible to make with all lines being continually busy. * * * The rear door served as an escape for me as I could not have handled the scene out front a second time. * * *

"Currently I find any reminder of post office, be it a jeep, carrier in uniform, or whatever, causes me great anxiety and emotional breakdown. These things and the trauma of that horrible day are being dealt with through professional counseling."

In a report dated February 20, 1987 Dr. Webb noted as follows:

"I have . . . seen [appellant] on three occasions since her attempt to return to work precipitated a return of severe depres-

> sive symptoms necessitating antidepressant medication. Her diagnosis at this time is Major Depressive Disorder (DSM III).
>
> "Her grief is complicated by the unexpected and violent nature of her husband's death and by the fact that she is also a postal employee who was at work while awaiting news of his fate. She was taken by her station manager to a site near the scene where there were distressed postal employees from the Edmond Station, and was there informed of his death. The setting of a postal station has therefore become indelibly and inextricably a part of the loss, and any feature of the station—jeeps, cases, uniformed carriers—is an agonizing reminder.
>
> "After achieving some improvement in her symptoms, [appellant] returned to work. Although she was given a different assignment with a minimum of station strappings, she nonetheless experienced a return of the symptoms of severe depression and ultimately required antidepressent medication to partially control these symptoms.
>
> "It is clear that the fact of her husband's murder having occurred at a postal station and the fact that she was at work at a postal station at that time have caused a link between her work and the trauma she has suffered, greatly prolonging the time she was disabled. She has continued to work in the more 'protected' setting at reduced hours, despite the resurgence of symptoms, and is still working at this time. She will require gradual desensitization (by gradual exposure) to the items noted above, with continued counseling. She will require medication for four to six more months.
>
> "She was totally disabled from August 20, 1986 to December 1, 1986, and will be partially disabled to the extent of requiring reduced hours and/or special attention to setting for a least another three to four months."

A hearing was held on February 26, 1987 during which appellant and the social worker who was acting as appellant's therapist, Karen Irey, testified. When asked by the Office hearing representative whether she thought the way that the employing establishment handled the situation caused any additional stress to appellant, Ms. Irey testified as follows: "That is just really hard to say that there would be any particular thing. . . . I think the fact that she was on the job, and those are the things that are associated now with the stress, is important. . . ."

In response to the question, "Would she have experienced the degree of stress that she has experienced, if she was not the wife of the person killed?" Ms. Irey replied: "No, it would take . . . her total involvement with both her husband working for the post office, the uncertainty of the day, just that combination of things. * * * The violence of the situation, the uncertainty of the day, of coming to work and not knowing, and going back and forth, thinking maybe her husband was killed and then finding out maybe he wasn't. And then the combination of working for the post office herself."

When asked by the Office hearing representative about when postal management first became involved with her in the incident appellant testified as follows: "[P]robably when I told them . . . I had heard about this on the way to work, [and asked] did they know anything, [and] what should I do? I was trying to decide whether to go to Edmond or go on into work. . . ." Appellant testified that the employing establishment responded as follows: "[W]e don't know what to tell you to do. . . . If you want to drive on in, . . . you don't have to clock in. We can give you a place to sit and wait until you hear." Appellant continued to testify as follows:

> "I got to work and I went to the locker room and in my statement. . . . I have put the approximate times—I can't tell you the exact times on that day—but I was given the option—of course, I was a wreck. . . . I was embarrassed because of the way I was acting. They said, 'you can clock in, or you can go into the locker room and wait awhile.' I chose to go into the locker room because I was in no condition to be on the work room floor, allowing . . . other employees to see me acting the way I was. * * *
>
> "[E]very so often—I had a radio in there, a headset radio, that they were calling downtown evidently, I guess they were. Alan sent Wendy back to check on me a time or two, and then she came back and said that there was one dead and I think there w[ere] six injured and that Lee was not on the list. And I felt greatly relieved. . . . I clocked in. I went to a case and started throwing mail and no phone call came telling me—'I am all right'. . . . And then the carriers were listening to radios and started talking about they are saying there are so many dead and so many injured. And Alan was calling down to see if he could find out anymore and Calvin Gould, who is one of the managers over the stations in Oklahoma City . . . told Alan 'It is bad. You better get her up here.' But Alan swears that he didn't know at the time that Lee was dead. * * * [A]s we walked out, I thought, 'I haven't clocked out' and

> he said 'Forget that; we need to get up there.' * * * I didn't go to the post office at Edmond that day. They wouldn't let us around it, the way I understand. . . . We were taken to an Administration Building, . . . the City of Edmond Administration Building which is near the post office. * * * There was a roomful of people and I did go up to a desk and I assume that I was talking to a female police person and tried to find out if they had a partial list there. Of course, Lee's name wasn't on it. I am assuming that that was a list of survivors, but she also said that there were people still at the post office and that this was not a complete list. * * * [Alan] stayed with me until a friend, who is also a postal worker, but not a management person, came to take me home."

By decision dated and finalized April 13, 1987 the Office hearing representative affirmed the decision of the Office denying appellant's claim on the grounds that appellant was not in the performance of duty at the time of her injury.

By letter dated June 10, 1987 appellant requested reconsideration. In support of her request appellant submitted a May 29, 1987 report from Dr. Webb, which noted as follows:

> "[Appellant] was first seen for counseling following the Edmond postal shootings. Her diagnosis at that time was Post-Traumatic Stress Disorder, Acute, and Uncomplicated Bereavement. As you may know, Post-Traumatic Stress Disorder is caused by a severe trauma in a person's life that is outside the range of usual human experience, and the person then develops certain symptoms because of the trauma. The stressor could be: (1) a serious threat to one's life or physical integrity, (2) serious threat or harm to one's family, or (3) witnessing of another's serious injury or death. In [appellant's] case the stressors were twofold: (1) being a witness to the pandemonium of the day, including the vascillations of her supervisors and being taken to the scene of the murders and (2) a serious harm to her family, that being her husband's murder. Her symptoms were classic symptoms of post-traumatic stress disorder, i.e. intense distress when reminded of the event, avoiding things which reminded her of the trauma, difficulty falling asleep, trouble concentrating, being exceptionally jumpy, a feeling of being different from other people, and extreme anxiety and nausea. The injury in this case is inextricably interwoven to both: (1) the witnessing of a vascillation of her supervisors and

> being taken to the scene of the murders and (2) the violent death of her husband. It is my opinion, that she would have experienced post-traumatic stress even if she had been told her husband was not killed.
>
> "Also, it should be noted that post-traumatic stress injuries are related to the length of time that a person endures the trauma. In [appellant's] case, the trauma was extraordinarily lengthy, that being from 8:00 a.m. when she first arrived at her job and heard about the murders until 11:30 a.m. when she left the scene of the Edmond city building. The trauma lasted 3½-hours as compared to other cases of trauma that have lasted only minutes, such as assault or robberies. * * * When she returned to her work in December her symptoms reoccurred. Although this was expected and normal, the symptoms of nausea, avoidance of relationships with co-workers and supervisors, and avoidance of the station break room are quite intolerable and handicapping in a work environment. For the first time in her treatment, [appellant] required an anti-depressant medication, and later an anti-anxiety medication, to partially control the symptoms. Thus, she was totally disabled from August 20, 1986 to December 1, 1986 and was partially disabled from December 1, 1986 through April, 1987. The stressors that caused the injury are intricately interwoven and include the witnessing of the scene of the murders, the vascillations of her supervisors, the length of time that she was exposed to the trauma, as well as the violent death of her husband."

By compensation order dated July 10, 1987 the Office denied appellant's application for review finding that the evidence submitted was cumulative and insufficient to warrant review.

The Board finds that appellant's emotional condition commencing August 20, 1986 due to the shooting death of her husband was not sustained while in the performance of duty.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment; liability does not attach merely upon the existence of an employee-employer relation.[1]

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[1] *Christine Lawrence*, 36 ECAB 422 (1985); *Minnie M. Huebner (Robert Adam Huebner, Jr.)*, 2 ECAB 20 (1948).

Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment." "In the course of employment" deals with the work setting, the locale, and time of injury whereas "arising out of the employment" encompasses not only the work setting but also a *causal* concept, the requirement being that an employment factor caused the injury.[3] In addressing this issue, the Board has stated that in the compensation field, to occur in the course of employment, in general, an injury must occur (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[4] To be covered by the Federal Employee's Compensation Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is to be performed, and the resultant injury.[5]

In *Lillian Cutler,*[6] the Board explained that where an employee experiences emotional stress in carrying out the employment duties, or has fear and anxiety regarding his or her ability to carry out such duties, and the medical evidence establishes that the disability resulted from his or her reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment, and would therefore come within the coverage of the Federal Employees' Compensation Act. The Board stated in *Pauline Phillips,*[7] that this is true where the employee's disability resulted from his or her emotional reaction to his regular day-to-day or specially assigned work duties or to a requirement imposed by the employment.[8]

In the present case appellant has alleged that she was in the performance of duty when she sustained an emotional injury, but she did not identify any specific duty or duties within her job description or any factors reasonably incidental thereto which caused her disability. The record reveals that the incident which caused appellant's disability was the learning by appellant of her husband's death. The Board notes that appellant's social worker therapist and her attending psychiatrist both noted that the cause of appellant's acute reaction of distress was the result of the combination of hearing of the shootings and knowing that her husband was a possible victim while she herself was on the job as a postal employee; of being taken to the Edmond city administration building near the site, of witnessing the distress of other employees; and of being informed of her husband's death. Dr. Webb identified the cause of appellant's subsequent post-traumatic stress reaction as being the association appellant made with her surroundings upon her return to work with the original acute trauma she sustained as a result of learning of her husband's death. Because appellant's emotional condition resulted from her reaction to knowledge of the shootings and to the subsequent revelation that her husband was among the dead, the Board finds that neither appellant's day-to-day duties, specially assigned duties, or any other requirement imposed by her employment caused her emotional condition.[9] The Board further finds that the record does not reveal that appellant has presented any evidence which establishes that her emotional condition was a reaction or response to duties incidental to her employment. Additionally, the Board notes that any assistance rendered appellant during the hours immediately following her husband's death was optional and was not a requirement or a factor of her employment as all such assistance was voluntarily offered or offered upon appellant's request in an attempt to support her and to meet her personal needs at that uniquely stressful time, and cannot therefore be considered as factors reasonably incidental to appellant's employment.

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[2] *See* Federal Employees' Compensation Act, 5 U.S.C. section 8101 *et seq.*

[3] *Dennis F. Rafferty,* 16 ECAB 413 (1965).

[4] *Carmen B. Gutierrez,* 7 ECAB 58 (1954).

[5] *Leo Boyd Purrinson,* 30 ECAB 644 (1979).

[6] 28 ECAB 125 (1976).

[7] 36 ECAB 377 (1984).

[8] *See also, Manuel W. Vetti,* 33 ECAB 750 (1982).

The decision of the Office of Workers' Compensation Programs hearing representative dated April 13, 1987 is hereby affirmed.

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[9] *Id.* at 756; *See also, Peter Sammarco,* 35 ECAB 631 (1984).

In the Matter of MARVIN J. HENDERSON *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Oklahoma City, Okla.

Docket No. 88-755; Submitted on the Record;
Issued June 23, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request to waive a $363.45 overpayment of compensation.

On January 26, 1984 appellant, then a 58-year-old electrical mechanic, filed a claim alleging that he injured his lower left back on January 25, 1984 when he was trying to pry some lumber. Appellant stopped work on the date of injury and received continuation of pay thereafter. The Office of Workers' Compensation Programs accepted appellant's condition as a lumbosacral strain and authorized medical benefits and compensation for temporary total disability through March 23, 1984. Appellant returned to work on March 26, 1984 but sustained a recurrence of disability due to his January 25, 1984 injury on June 4, 1984, after which he returned to work on July 31, 1984. On January 17, 1985 appellant sustained another recurrence of disability due to his January 25, 1984 injury, after which he did not return to work. Subsequently it was determined that appellant had a herniated disc.

In a November 5, 1985 letter, the Office informed appellant that he would receive payments for temporary total disability at four-week intervals. The letter informed appellant that he would receive a check in the net amount of $2,852.92 for the period from January 24, 1985 to March 26, 1985 which represented two-thirds of his pay rate used to compute his gross compensation, and that, for the period from August 4, 1985, he would begin receiving regular payments in the amount of $1,479.00 every four weeks, representing 75 percent of his weekly pay rate (appellant had married on March 27, 1985). Appellant received a "supplement" at the 75 percent rate from March 27, 1985 to August 3, 1985.

In a December 9, 1986 letter, the Office of Personnel Management informed the Office that appellant, who had been receiving a civil service annuity, had elected to receive compensation benefits and also indicated that, commencing May 25, 1986, appellant had elected "no reduction" in his "post-retirement basic life" insurance with a premium rate of $52.50.

In a December 31, 1987 memorandum, the Office determined that because the Office of Personnel Management did not promptly notify the Office of appellant's life insurance election, the monthly premiums had not been withheld from appellant's compensation payments for the period of May 25, 1986 through December 20, 1986. The Office determined that this had resulted in a $363.45 overpayment to appellant. However, the Office also found that since appellant was probably unaware that the insurance premiums should have been deducted, a preliminary finding that appellant was without fault in creating the overpayment should be entered and that a form CA-2202 be issued.

By letter dated December 31, 1987, the Office sent appellant a form CA-2202 letter advising him of the $363.45 overpayment and of the finding that appellant was not at fault in the overpayment's creation. Also enclosed was an OWCP-20 overpayment recovery questionnaire form. The letter informed appellant that, if he disagreed with the amount or the fact of the overpayment, he had the right to submit new evidence. The letter also noted that, since appellant was without fault, recovery could not be made if the recovery could be shown to defeat the purpose of the law or would be against equity and good conscience. The letter then requested that if appellant desired a waiver of the overpayment, he should request a prerecoupment hearing and submit detailed financial information and a completed overpayment recovery questionnaire. The Office requested that appellant reply within 30 days. No reply was received.

By letter compensation order dated February 2, 1988, the Office informed appellant that the circumstances of his case did not warrant waiver of recovery of the overpayment. The letter stated that $181.73 would be withheld from appellant's continuing compensation payments, effective February 14, 1988, and that interest would start accruing from the date of the order at the rate of the U. S. Treasury Note. An accompanying memorandum noted that appellant had not responded to the December 31, 1987 Office letter and since appellant had not alleged any error of fact or law, waiver was not applicable.

In his appeal letter, appellant stated that he did not contest the fact of overpayment, only the method of repayment and the accrual of interest on the overpaid amount.

The Board finds that the Office of Workers' Compensation did not abuse its discretion in denying appellant's request to waive a $363.45 overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets tests set forth as follows in section 8129(b):

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." [1]

In a December 31, 1987 letter, the Office informed appellant of the overpayment and of the finding that appellant was not at fault in creating the overpayment. The letter advised appellant that if he disagreed with the amount or the fact of the overpayment, he had the right to submit new evidence. The letter stated that appellant could request a prerecoupment hearing and submit detailed financial information and a completed overpayment recovery questionnaire within 30 days if he desired the overpayment to be waived. Appellant did not respond to the Office's request for additional information and, on February 2, 1988, the Office informed appellant that after studying his case it had been determined that the circumstances did not warrant waiver of recovery of the overpayment.

Section 10.321(h) of the Code of Federal Regulations states in relevant part:

> "If additional written evidence is not submitted, or a hearing requested, within the 30 day period, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action." [2]

Because appellant failed to submit the requested financial information or request a prerecoupment hearing within 30 days, the Office acted in accordance with the Act and regulations promulgated thereunder in determining that waiver of recovery was not warranted and in taking appropriate collection action.[3]

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[1] 5 U.S.C. section 8101, *et seq.*

[2] 20 C.F.R. section 10.321(h).

The February 2, 1988 Office of Workers' Compensation Programs decision is affirmed.

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[3] In his appeal, appellant contended that he should not be held liable for interest on any overpayment that he might be required to repay. However, 31 U.S.C. section 3717(a)(1) authorizes the "head of an executive or legislative agency" to charge an annual interest rate that is equal to the average investment rate for the Treasury tax and loan accounts on outstanding debts owed to the United States government.

In the Matter of EARL D. PRICE *and* PEACE CORPS, Washington, D.C.

Docket No. 88-639; Submitted on the Record; Issued June 24, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has met his burden of proof in establishing that he contracted Type I diabetes mellitus during his Peace Corps service abroad.

On December 10, 1986, appellant, a 27-year-old financial analyst, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he contracted diabetes while stationed in Cameroon as a Peace Corps volunteer. The record indicates that appellant joined the Peace Corps on October 22, 1986 and was assigned to Cameroon for training. On November 24, 1986, in response to complaints of frequent urination and thirst, appellant underwent a urine test which was positive for glucose. Appellant returned to the United States where he underwent tests at George Washington University Hospital and was diagnosed as having Type I diabetes mellitus.

In order to determine whether appellant contracted diabetes during his Peace Corps service abroad, the Office of Workers' Compensation Programs requested Dr. Ira E. Kaplan, a Board-certified internist acting as an Office medical consultant, to review the medical evidence of record, which included appellant's preemployment medical reports as well as the reports pertaining to appellant's hospitalization and testing at George Washington University Hospital, and to provide an opinion on whether appellant's condition was employment-related. Dr. Kaplan reviewed the medical evidence of record and noted that Type I diabetes mellitus is a preexisting con-

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dition due to genetic factors and further noted that appellant's "exaggerated ill feeling after drinking alcohol and sense of fatigue" which he experienced prior to his federal employment, as noted by Dr. Jacobs, a Board-certified internist, in a December 22, 1986 report, may have been indicative of diabetes. Dr. Kaplan concluded that appellant did not contract diabetes while stationed in Cameroon but experienced a flare-up of this preexisting condition.

By compensation order dated August 28, 1987, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim for compensation on the basis that the medical evidence of record established that appellant's diabetes was not contracted during his Peace Corps service abroad but is a preexisting condition which manifested itself during such service.

The Board finds that appellant has not met his burden of proof in establishing that he contracted Type I diabetes mellitus during his Peace Corps service abroad.

Section 10.605 of Title 20 of the Code of Federal Regulations, the implementing regulations of the Federal Employees' Compensation Act,[1] pertains to conditions of coverage of Peace Corps volunteers while serving abroad and provides as follows:

> "(a) Any injury suffered by a volunteer during any time when the volunteer is located abroad shall be presumed to have been sustained in the performance of duty and any disease or illness contracted during such time shall be presumed to be proximately caused by the employment, except the presumption will be rebutted by evidence that:
>
>> '(1) The injury or disease or illness was caused by the volunteer's willful misconduct, intent to bring about the injury or death of self or another, or was proximately caused by the intoxication by alcohol or illegal drugs of the injured volunteer; or
>>
>> '(2) The disease or illness is shown to have preexisted the period of service abroad; or
>>
>> '(3) The disease or illness or condition claimed is either a manifestation of symptoms of or consequent to a preexisting congenital defect or abnormality.'
>
> "(b) If an injury is not presumed to have been sustained in the performance of duty as provided by paragraph (a) of this section, the volunteer has the burden of proving by the submis-

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[1] 5 U.S.C. section 8101 *et seq.*

> sion of substantial and probative evidence that the injury was sustained in the performance of duty with the Peace Corps.
>
> "(c) If a disease or illness or claimed condition, or episode thereof, comes within exception paragraph (a)(2) or (a)(3) of this section, the volunteer has the burden of proving by the submission of substantial, probative and reasoned medical evidence that it was proximately caused by the factors of conditions of Peace Corps service, or that the condition was materially aggravated, or accelerated or precipitated by factors of Peace Corps Service." [2]

The medical evidence of record establishes that appellant's Type I diabetes mellitus is not a condition which he contracted during his Peace Corps service abroad but rather is a preexisting genetic condition which manifested itself during such service. Accordingly, because the medical evidence of record establishes that appellant's diabetes is a preexisting genetic condition, within the meaning of 20 C.F.R. section 10.605(a)(3), there is no presumption that this condition is employment-related and, pursuant to 20 C.F.R. section 10.605(c), appellant bears the burden of establishing the employment relation. This burden includes the submission of substantial, probative and reasoned medical evidence supporting that appellant's condition was proximately caused, materially aggravated, accelerated or precipitated by factors of his Peace Corps service.[3] Currently there is no reasoned medical evidence of record supporting appellant's claim of causal relation between his Peace Corps service abroad and his diabetes.

Appellant contends in support of his claim that it was not until he was stationed in Cameroon that his diabetic symptoms were exhibited. In this regard, the Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[4] Neither the fact that the disease or condition became apparent during a period of employment nor the belief that the disease was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[5] Causal relationship must be substantiated by reasoned medical opinion evidence [6] which is appellant's responsibility to submit.

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[2] 20 C.F.R. section 10.605 (revised April 1, 1987).

[3] *See* 20 C.F.R. section 10.605 (revised April 1, 1987).

[4] *William Nimitz, Jr.*, 30 ECAB 567 (1979).

[5] *Birger Areskog*, 30 ECAB 571 (1979).

[6] *See Margaret A. Donnelley*, 15 ECAB 40 (1963).

The decision of the Office of Workers' Compensation Programs dated August 28, 1987 is hereby affirmed.

In the Matter of DONALD R. SCHUELER *and* DEPARTMENT OF DEFENSE, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 88-341; Submitted on the Record; Issued June 23, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in refusing to waive an overpayment of compensation benefits; and (2) if not, whether the Office properly required repayment at the rate of $193.00 per pay period.

On February 3, 1983 appellant, then a 39-year-old general foreman, electronics mechanic, filed a claim for "aggravation of insulin-dependent diabetes, due to job stress." The Office of Workers' Compensation Programs accepted appellant's claim for temporary aggravation of his preexisting diabetes for the period of December 28, 1982 through February 28, 1983.

By letter decision order dated August 3, 1984 the Office denied all compensation after February 28, 1983 finding that the medical evidence established that the temporary aggravation of appellant's diabetic condition had ceased. Appellant disagreed with the Office's August 3, 1984 decision and requested a hearing before an Office hearing representative. By hearing representative decision dated November 15, 1984 the hearing representative set aside the Office's August 3, 1984 decision and remanded the case for further development of the medical evidence of record to be followed by a *de novo* decision. By letter decision order dated May 20, 1985 the Office again denied appellant's compensation benefits after February 28, 1983 finding that the medical evidence of record established that there was no continuing causal relationship between the temporary aggravation of appellant's preexisting diabetes condition and the accepted employment injury after February 28, 1983.

Appellant requested a hearing regarding the Office's May 20, 1985 decision submitting medical evidence from his treating physician. By hearing representative decision dated December 3, 1985 the Office's May 20, 1985 decision was set aside and the case was remanded to obtain an impartial medical evaluation of appellant, to be followed by a *de novo* decision. By letter compensation order dated March 28, 1986 the Office affirmed its decision rejecting appellant's claim for compensation for temporary aggravation of his preexisting diabetic condition after February 28, 1983 as the medical evidence established that his federal employment resulted in only a temporary aggravation which ceased by that date. Appellant's claim was accepted, however, for a permanent aggravation of his preexisting psychiatric condition, as the medical evidence established that appellant sustained a psychiatric condition due to the December 28, 1982 work injury. Appellant's psychiatric condition was accepted for the period subsequent to March 1, 1983.

The Office was advised that Office of Personnel Management benefits were being terminated effective March 31, 1986. The Office commenced payment of compensation for temporary total disability effective April 1, 1986.

By letter dated April 18, 1986 appellant was advised of his entitlement to compensation benefits beginning April 1, 1986 and retroactive to March 1, 1983. This letter instructed appellant to notify the Office of any employment and wages earned during the period March 1, 1983 through April 17, 1986. On this same date, appellant was sent a form CA-1032, which requested information concerning any employment held by appellant. On May 1, 1986 appellant responded to the Office's request for information regarding his employment status stating that he worked as a clerk for the period January 1, 1985 to present. By memorandum dated May 1986 the Office advised appellant that his compensation would be adjusted based on the earnings information he had provided.

On August 1, 1986 appellant was issued a check in the amount of $42,594.13 covering the period March 1, 1983 through March 31, 1986.

By letter decision order dated April 7, 1987 the Office adjusted appellant's compensation rate effective January 1, 1985, finding that appellant's current employment position as a clerk earning $125.00 per week reasonably represented his wage-earning capacity. A preliminary determination was made that there had been an overpayment in the amount of $10,199.03 in appellant's case as he was paid full temporary total disability compensation payments for the period January 1, 1985 through March 14, 1987 while he had actual earnings. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment as he "should have been reasonably aware that compensation payments would be reduced when [he] had earned income."

Appellant was requested to complete an overpayment recovery questionnaire which he did on May 6, 1987. Appellant listed a total monthly income of $2,719.70 and monthly expenses of $2,511.63. He listed business assets (inventory, fixtures, capital) of $55,000.00 and individual assets of $2,458.18. Appellant requested a hearing on the issue of fault and waiver with respect to the overpayment in his case.

By undated memorandum to the file the Office noted that the record contained information regarding appellant's employment by medical report dated February 14, 1986; by testimony given by appellant at the September 27, 1985 hearing; and by appellant's submission of form CA–1032 on May 1, 1986. The memorandum stated that appellant was not at fault in the creation of the overpayment since he had put the Office on notice of employment prior to compensation being initially paid in 1986; because he was not aware of what his entitlement would be for temporary total disability; and because he did not receive an explanation of the lump sum check issued him covering the period from 1983 to April 1986.

A hearing was held on June 18, 1987 in which appellant and his wife testified and submitted evidence. They presented numerous exhibits showing that appellant had submitted evidence of his employment prior to the initial decision granting compensation. Appellant testified that he was given no explanation as to how compensation was computed for the lump sum paid for the period March 31, 1983 to March 31, 1986 and that the figures supplied concerning his entitlement to compensation were unclear and did not coincide with the information shown. Appellant stated that he was not sure the overpayment amount was accurate as he was given no explanation concerning the figures used or how they were applied for the period covered by the lump sum payment.

By hearing representative decision dated August 27, 1987, and finalized that same day, the hearing representative found that appellant was "without fault" in the creation of the overpayment, but held that recovery of the overpayment should not be waived since the overpayment was not found to defeat the purpose of the Federal Employees' Compensation Act or be "against equity and good conscience." The hearing representative stated that "the minimum amount of 10 percent from [appellant's] net entitlement, $193.00 will be withheld each pay period to repay the overpayment outstanding." Accompanying the August 27, 1987 decision were detailed computations determining the amount of the overpayment in appellant's case. These figures revealed that the correct amount of overpayment in appellant's case was $10,271.82 and not the figure $10,199.03 earlier computed.

The Board finds that the Office did not abuse its discretion by refusing to waive the overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation Act [1] provides that where an overpayment of compensation had been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."

20 C.F.R. section 10.322 provides the following guidelines with respect to when recovery of an overpayment would defeat the purpose of the Act:

> "(a) General Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:
>
> > "(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and
> >
> > "(2) The individual's assets do not exceed the resource base of $3,000.00 for an individual or $5,000.00 for an individual with a spouse or one dependent plus $600.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment. . . .
>
> "The first $3,000.00 or more depending on the number of the claimant's dependents is also exempted from recoupment."

20 C.F.R. section 10.323 provides, in pertinent part:

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[1] 5 U.S.C. section 8129.

> "(a) Recovery of an overpayment is considered to be 'against equity and good conscience' when an individual presently or formerly entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria applied in determining severe financial hardship are the same as in 10.322.[2]
>
> "(b) Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered. To establish that a valuable right has been relinquished, it must be shown that the right was in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss. * * *"

In *Robert E. Wenholz,*[3] the Board found that Chapter 2-901 of the Office Procedure Manual sections 4(b)(1)(a) and (b) were meant to be read conjunctively and that a claimant must meet both conditions before recovery will defeat the purpose of the Act.[4] Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current and ordinary living expenses, and also that his assets which are not exempt [5] do not exceed a resource base of $5,000.00. Thus, detailed financial information is required on appellant's income, expenses, assets, and debts. Appellant provided detailed financial information on May 6, 1987. The financial data submitted establishes that appellant has monthly expenses of $2,511.63 and a monthly income of $2,719.70. An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if the monthly income does not exceed monthly expenses by more than $50.00.[6] As appellant's current monthly income is $208.07 greater than his monthly necessary living expenses, appellant under the Act, does not need substantially all of his current income to meet his current monthly expenses. Accordingly, appellant has not met both criteria outlined in section 10.322(a) (1) and (2) and therefore waiver of the overpayment is not warranted under the "defeat the purpose of the Act" clause.

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[2] The Board notes that 20 C.F.R. section 10.323(a) and 10.322(a) appear to be duplicative in effect. The Board also notes that FECA Bulletin No. 87-32 (issued May 11, 1987) indicates that amendment to the Rules contemplated "no significant differences between this section [20 C.F.R. section 10.323] and Chapter 2-901(c) of the Federal (FECA) Procedure Manual."

[3] *Robert E. Wenholz,* 38 ECAB 311 (1986).

[4] Effective June 1, 1987 Chapter 2-901 sections 4(b)(1) (a) and (b) of the Office Procedure Manual were codified into 20 C.F.R. section 10.322.

[5] 20 C.F.R. section 10.322(d)(2) provides, in part: "Assets for these purposes do not include the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile, or income producing property if the income from such property has been included in comparing income and expenses."

Considering the financial data submitted by appellant the Board finds that recovery of the overpayment would not be against equity and good conscience since there is no evidence of record that appellant relinquished a valuable right or changed his position for the worse by reliance on the compensation payment. The Board therefore finds that appellant does not qualify for a waiver of recovery of the overpayment.

The Board further finds however that the case is not in posture for decision with regard to the issue of whether the Office properly determined that $193.00 would be withheld from appellant's continuing compensation benefits.

The Office determined that $193.00 would be the amount withheld from appellant's continuing compensation benefits every pay period based upon FECA Bulletin 87-19 which states in "all overpayment cases the minimum acceptable offset against continuing benefits will be ten percent of each scheduled payment; however, in no case will the amount of offset be less than what the required offset payment would be for a federal employee who is at the minimum level of pay of Grade 2, Step 1 and who is receiving augmented benefits for temporary total disability" (calculated as currently $62.00). However, the Office failed to consider 20 C.F.R. section 10.321(a) in its decision. 20 C.F.R. section 10.321(a) states:

> "Except for an overpayment resulting from forfeiture of previously paid compensation such as provided in section 10.125, whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors so as to minimize any resulting hardship upon such individual. * * *"

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[6] Federal (FECA) Procedure Manual, Part 2—Claims—Overpayments, Chapter 2-901.4(b)(3); *Leonard Hoffman*, Docket No. 87-622 (issued May 29, 1987).

The Office did not consider the extent of appellant's financial expense and obligations and the effect of the withholding of part of appellant's compensation benefits on those obligations. FECA Bulletin No. 87-19 does not allow the Office to ignore the provisions of 20 C.F.R. section 10.321(a) in ensuring that recovery of an overpayment is made to minimize any resulting hardship upon appellant.[7]

On remand the Office must further develop the case record to determine the effects of the $193.00 withholding on appellant's financial obligations.

The decision of the Office of Workers' Compensation Programs dated August 27, 1987 is hereby affirmed with respect to the finding that recovery of the overpayment should not be waived. However, with respect to the rate of adjustment in the recovery of the overpayment, the decision is set aside and the case is remanded for a *de novo* decision and further development of the record consistent with this decision.

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[7] *Joyce Y. Wescott*, 39 ECAB 349 (1988).

In the Matter of Leonard Dureseau, Jr. *and* U.S. Department of Agriculture, Agricultural Research Service, Beltsville, Md.

Docket No. 86-2174; Submitted on the Record;
Issued June 24, 1988

Before Michael J. Walsh, David S. Gerson, Willie T.C. Thomas

The issue is whether appellant's disability due to an emotional condition is causally related to factors of his federal employment.

On May 18, 1977 appellant, then a 43-year-old insect research technician, filed a claim alleging that his psychosomatic condition was causally related to factors of his federal employment. In a statement accompanying the claim form, appellant attributed his problems to military incidents and incidents in civilian employment. The civilian employment incidents cited by appellant were: (1) low wages in 1962; (2) his employer gave other employees a right to refuse to work with him; (3) a failure to be promoted; (4) racist remarks by a supervisor; and (5) transfer from duty station in France to Beltsville, Maryland in August 1975. Appellant alleged that the transfer in August 1975 did not correspond to his abilities and stated the United States was more racist than France. He stated that after the transfer to Maryland his supervisor suspected him of sick leave abuse and improperly wrote a letter to his psychologist concerning such.

In support of his claim, appellant submitted a "summary of psychological assessment and psychotherapy" from his psychologist, Colin Frank, Ph.D.[1] The doctor related a history of appellant experiencing "psychophysical symptoms, including suffocating chest pressure, choking, and dyspepsia, soon after his transfer from Paris to his current post." Appellant was evaluated by Dr. Kenneth Chase, a Board-certified internist, who noted that appellant's physical examination was essentially negative for organic causes and that stress was the only known precipitating factor.[2] Appellant was thereafter assessed at the George Washington University Psychiatric Clinic where his condition was diagnosed as an obsessive compulsive personality disorder. Dr. Frank concluded the following:

> "[Appellant] has a characterological problem that is exacerbated by job stress and a series of poor relationships with supervisors. One major precipitant appears to be the separation from his European post and the support and acceptance gained in his off-duty relationships."

Appellant's supervisor submitted a June 27, 1977 statement describing appellant's duties, which included mixing media for rearing insects, transferring insects from one container to another, identifying insects as to species and sex, laying out and planting experimental plots, designing and preparing equipment for rearing insects, summarizing data, applying insecticides, cleaning glassware, maintaining recording instruments, and preparing traps. The supervisor confirmed that on March 7, 1977 he had written to appellant's doctor asking whether an eight-hour day each week was necessary for psychotherapy. The supervisor explained that he was not seeking confidential information regarding appellant's health when he contacted appellant's doctor, rather he was seeking verification that appellant's absences were justified.

Diane Choate, a social worker, submitted a record for the period September 25 through October 5, 1976. Ms. Choate recorded a history of boring work assignments and prejudice from coworkers. She diagnosed obsessive compulsive personality disorder and depressive reaction.

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[1] Dr. Frank noted that he is a licensed psychologist in the District of Columbia and a certified psychologist in the State of Maryland.

[2] A copy of Dr. Chase's June 21, 1976 office notes are a part of the record.

By letter dated September 27, 1977 the Office of Workers' Compensation Programs advised appellant that the transfer from France to the United States was not a compensable factor of employment unless he could prove that the transfer itself was a form of harassment. The Office further requested appellant to submit further details of specific instances of harassment at his current place of employment.

In a reply dated October 3, 1977 appellant cited the following incidents: (1) his former supervisor in France put everyone, except him, in for a promotion; (2) his current supervisor had secretly requested confidential and privileged information concerning his health; and (3) the supervisor did not allow a secretary to help him perform a very time-consuming task.

Appellant, through counsel, submitted a lengthy personal narrative report dated September 10, 1980 which added further details and some new allegations of improper treatment by the employing establishment. Basically appellant alleged that from the start of his federal employment in 1962 he was subject to racial discrimination when: (1) his starting salary was below the guaranteed minimum paid to other Americans; (2) his per diem rate on travel was lower than other employees; (3) a supervisor asked other employees whether they wished to travel with appellant because of his race; (4) his supervisor asked for promotions for everyone except appellant; (5) the supervisor did not want appellant to attend school during official hours at government expense; (6) the supervisor unjustly criticized appellant's job performance in relation to a cereal leaf beetle project; (7) appellant was not given proper recognition for other projects and discoveries; (8) another supervisor made racist remarks; (9) the supervisor did not submit appellant's name for promotion; (10) the supervisor falsely accused appellant of willful delay in departing Turkey after a field trip; (11) the supervisor denied official time for appellant's classes and did not like appellant's use of overtime; (12) the supervisor gave a less favorable performance evaluation for appellant than he should have; (13) the assignment in Beltsville did not correspond to appellant's abilities and experience; and (14) the supervisor improperly contacted appellant's doctors for verification of sick leave used.

In an Office form report dated November 30, 1980 Dr. Frank stated that he had provided appellant with weekly psychotherapy from November 19, 1976 until June 30, 1977, when appellant moved to Minneapolis. The doctor diagnosed "moderate to severe depression, obsessive-compulsive personality" causally related to factors of appellant's federal employment. Dr. Frank stated:

> ". . . Mr. Dureseau sought therapy because the physical reactions to the stress of his employment had become intolerable. He strove to maintain his employment.
>
> "It was with difficulty that I was able to help Mr. Dureseau keep a reasonable attitude towards work, considering his feelings of persecution. He was chided about his choice of physicians and the lost time necessary to keep medical appointments. It was in this context that Mr. Cantelo's [appellant's supervisor] letter to me was so disturbing to him; it threatened the confidentiality of his relationship with me and questioned by implication, his veracity. This kind of intrusion by a supervisor into the privacy of a patient is unique in my experience.
>
> "After Mr. Dureseau was advised of Mr. Cantelo's letter it became nearly impossible to dissuade him of frankly paranoid ideas. His self-control increased to the point of danger to himself and others. [sic]
>
> "To summarize: Mr. Leonard Dureseau sought therapy in an effort to ameliorate stress symptoms caused or significantly worsened throughout his tenure with the USDA. He has an unblemished work record, and handled complaints of racial prejudice appropriately, through channels. During a depressing and confusing episode, Mr. Dureseau's supervisor, Mr. Cantelo wrote to me secretly. The fact that this letter was not shown or discussed with Mr. Dureseau by Mr. Cantelo severed the slender thread of self-control that was left. It was the act that crystallized Mr. Dureseau's paranoid feelings and made it impossible for him to continue work."

By compensation order dated April 3, 1981 the Office rejected appellant's claim for compensation on the basis that "[t]he relationship of a disabling emotional condition to factors of the employment is not established."

At appellant's request, a hearing was held before an Office hearing representative on November 19, 1981. Appellant testified regarding his work experience in France and Maryland. He felt that he had been a victim of racism throughout his employ with the federal government, but his emotional problems did not begin until after his reassignment to Maryland. Submitted at the hearing was a September 2, 1980 report from Dr. Jean Covert Sauer, a Board-certified psychiatrist, which concluded, "It is fair to say that conditions of his [appellant's] employment aggravated and precipitated the acute psychiatric condition which lead to his medical retirement."

By decision dated April 5, 1982, finalized on April 7, 1982, the hearing representative remanded the case for further development. The hearing representative instructed the District Office to obtain the name and other details related to the moving-into-the-hall incident, and to obtain details of the change in job from France to Beltsville; to subsequently prepare a statement of accepted facts and to refer the case and appellant to an impartial medical specialist for an opinion on causal relationship.

On remand, appellant submitted an October 7, 1982 statement describing details of the move-into-the-hall incident, stating that another employee moved his desk into the hall rather than share an office with appellant. He stated that he had been told by a coworker of racist remarks made by his second line supervisor. Appellant explained that his job in France concerned insects whereas the job in Maryland concerned chemicals. Appellant stated that his supervisor did not treat him as a professional. Appellant further expanded on his lack of promotions and his supervisors' wrongful actions.

The Office provided a copy of appellant's statement to the employing establishment for comments. Appellant's supervisor from 1966 to 1970 submitted an August 19, 1983 statement. The supervisor explained that appellant was hired at a lower wage rate because he had been hired by the U.S. Embassy and not by the employing establishment; and the lower wage rate was the rate for all local hires. The supervisor further stated that appellant was given opportunities for training and during 1970–1971 was taking classes on government time not related to biology which shocked him; that he did not deny appellant a promotion but did question whether it should occur automatically; that appellant performed average and above average; that he never engaged in any acts of harassment or discrimination against appellant, nor did he ever witness any such acts.

An August 19, 1983 statement was submitted by Mr. Drea who was a staff member from 1963 to 1965, acting in charge from October 1969 to January 1970, and Investigations Leader from April 1970 to 1980. Mr. Drea stated that in May 1963 appellant stated that he was going to obtain a disability retirement; that appellant's wages and trip per diem were set by the U.S. Embassy; that appellant did not merit any sooner promotion than he received and he was promoted as fast or faster than normal; that education at government expense was terminated when appellant failed to provide documentation to show his courses were employment-related; and that he did not know that other employees were asked if they wished to travel with appellant on the basis of race.

Appellant's supervisor submitted a May 23, 1983 statement in which he explained that the move-to-the-hall incident occurred not because of race but because the other employee wanted a room to himself; that the move was not actually to a hall but to a room commonly used to get from one passageway to another; that no racist remarks were made; that appellant's work as a technician was below the professional level; and that chemical work constituted only a small part of appellant's activities. The supervisor further commented on his attempts to obtain documentation for appellant's absences from work explaining that appellant had been advised to provide documentation of his inability to work, but did not do so, which necessitated the letter to appellant's physician requesting documentation.

Mr. Coulson, a fellow employee of appellant, stated in an August 19, 1983 statement that he had known appellant personally and professionally since 1965 in France; that appellant had always been sensitive about race and considered France less racist than the United States; that appellant had been promoted at a normal or above-normal rate; that appellant's lower per diem pay rate was not racially motivated; that appellant was being groomed to be an entomologist in France; that in Maryland appellant wanted to be treated as an independent research entomologist but was actually only a technician; and that there was no racism at work in France or Maryland directed at appellant.

Appellant's second-line supervisor explained in an August 8, 1983 statement that it was his responsibility to keep track of employees' attendance and he had been informed of appellant's amount of Friday leave taken.

The Office prepared a statement of accepted facts and referred appellant, along with the entire case record, to Dr. Donald M. Mayberg, a Board-certified psychiatrist, for evaluation. Dr. Mayberg diagnosed major depression confirmed by history, by psychiatric evaluation, and by psychological testing. The doctor concluded in his March 12, 1984 report that appellant's condition had "been proximately caused by factors of his employment." Dr. Mayberg cited those factors of employment as "the perceived actions of his supervisors which discriminated against him, caused him to lose self esteem, and to feel harassed when he attempted to seek medical/psychological help." While the doctor did not find a preexisting condition of depression, he found "a basic mistrust of every white man and every social system controlled by white men." Dr. Mayberg found appellant to be disabled at that time as a result of his major depression.

By letter dated April 25, 1984 the Office advised Dr. Mayberg that it had not accepted as factual that appellant was subjected to discrimination or harassment during his federal employment. The Office thus requested clarification from Dr. Mayberg. The doctor submitted the following May 16, 1984 response:

> "The questions you raise relate to my use of the word 'perceived'. I used the word 'perceived' advisedly because I felt that my role was medical and not judicial—that is to say that I cannot be in a position of determining whether Mr. Dureseau was discriminated against or whether he was not. The problem has always been similar to the dilemma felt by the passenger on an airplane who feels that one of the jet engines is on fire when he sees the sparks flying out of the engine. The feeling is exactly the same whether the engine is on fire or is not. Thus for Mr. Dureseau the feeling of being discriminated against, the feeling of loss of self esteem, the feeling of harassment is the same whether this did indeed occur, or whether Mr. Dureseau felt that it occurred. Historically it would appear that the major depression did develop at or around the same time that Mr. Dureseau was returned to an assignment in Beltsville, Maryland. It was at this time that the perceived actions of his supervisors became most distressing to him and caused him to seek medical/psychological help."

In a December 10, 1984 report John M. Taborn, Ph.D., a licensed consulting psychologist, concluded that appellant had been in fact subjected to actual racist activities (defined as intentional or unintentional aggrandizement of a majority group in comparison to a minority group which results in the minority group being systematically deprived of rights, privileges, status and human dignity) and that such racist activities resulted in a chronic depression.

By compensation order dated May 28, 1985 the Office rejected appellant's claim on the basis that he "has not established that he sustained injury while in the performance of duty under the meaning of the Act."

At appellant's request, a second hearing was held before an Office hearing representative on May 13, 1986. After the hearing appellant submitted a June 5, 1986 report from Dr. Frank which stated in pertinent part:

> "I will now answer your question as to whether it was Mr. Dureseau's personality problem or racial discrimination that was responsible for his illness. It was clearly discrimination that was responsible for his illness. His personality problem simply made him more vulnerable, because he did not have an adequate means to express the stressful effects."

By decision dated July 17, 1986, finalized on July 18, 1986, the Office hearing representative found that appellant "has failed to establish that his disability constitutes an injury sustained in the performance of duty." The hearing representative stated the following as the basis of his decision:

> "The medical evidence would indicate that the claimant's perception that events at work were motivated by racism caused his disability. However, there is no substantial evidence showing that work events were actually motivated by racism. Therefore, the claimant's condition is self generated since it cannot be said that the actual alleged intervening element—racial harassment and discrimination—actually existed."

The Board finds that appellant's disability due to an emotional condition is causally related to factors of his federal employment.

Where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

Where the employee has alleged that the employment situation which caused his emotional reaction included actions taken by his superiors which the employee described as constituting harassment,[4] the issue, generally speaking, is not whether in fact there was harassment, or discrimination, but whether the disabling emotional reaction was "precipitated or aggravated by the conditions of the employment."

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[3] *Lillian Cutler,* 28 ECAB 125 (1976) and cases cited therein.

[4] *Anna J. Backman,* 30 ECAB 118 (1978).

In the present case, appellant alleged that his emotional problems were the result of several incidents in his federal employment. Among those incidents cited were: (1) low wages in 1962; (2) his supervisor questioning his use of sick leave; (3) his supervisor not allowing a secretary to help him perform a very time consuming task; (4) criticism by his supervisor of his performance in relation to a cereal leaf beetle project; (5) a coworker moving into a hall rather than share an office with him; (6) not receiving proper recognition for projects and discoveries; and (7) receiving a lower per diem rate on travel. Several supervisors and other employees submitted statements in which they denied that appellant was harassed or discriminated against. The incidents cited by appellant were explained by the supervisors. Thus, it is reasonably clear that most of the incidents and situations occurred; the discrepancy is whether the situations constituted discrimination or harassment. However, as the Board noted above the issue is not whether in fact there was harassment or discrimination but whether the disabling emotional reaction was precipitated or aggravated by the conditions of the employment. Dr. Mayberg concluded that appellant's emotional condition was causally related to the conditions of his employment, *i.e.*, the perceived discrimination by his supervisors. Since appellant perceived the actual incidents at work as being discrimination or harassment, and his emotional condition resulted from these incidents, the Board finds that his emotional condition is employment-related.

The July 17, 1986 decision of the Office of Workers' Compensation Programs is reversed.

In the Matter of ANDREW LOSH *and* DEPARTMENT OF DEFENSE, DEFENSE SUPPLY AGENCY, Cleveland, Ohio

Docket No. 88-145; Submitted on the Record;
Issued June 30, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether the accepted aggravation of appellant's arteriosclerotic heart disease by factors of his federal employment was a temporary or permanent disability; and (2) whether appellant has any permanent impairment due to the accepted aggravation.

This is appellant's second appeal to the Board. In the first application appellant appealed from a September 29, 1982 decision of the Office of Workers' Compensation Programs in which it refused to modify a July 9, 1982 decision of an Office hearing representative on the grounds that the evidence submitted in support of request for modification was cumulative and therefore lacking in substantial probative value. In the July 9, 1982 decision, the Office hearing representative found that the employment-related aggravation of appellant's arteriosclerotic heart condition had ceased by February 25, 1981, and he affirmed the Office's January 22, 1981 decision terminating compensation. On September 27, 1983 the Board issued an Order Remanding Case finding that a conflict in medical opinion evidence existed between Dr. Martin I. Broder, a Board-certified cardiologist, who opined in an October 14, 1980 report that the stress of appellant's employment caused a temporary aggravation of his hypertension and multiple arrhythmias which ceased when he stopped working, and Dr. Bernard L. Charms, a Board-certified internist specializing in cardiovascular and pulmonary diseases, who opined in a September 21, 1982 report that the stress of appellant's employment accelerated and permanently aggravated his heart condition, with directions to the Office to refer appellant together with the case record and a statement of accepted facts to an appropriate impartial specialist for resolution of the conflict and an opinion on whether appellant's employment caused a temporary or permanent aggravation of his heart condition, to be followed by a *de novo* decision.[1]

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[1] On May 29, 1974 appellant, then a 52-year-old industrial engineer, filed a Notice of Occupational Disease alleging that a routine physical examination on Feburary 15, 1974 had revealed that appellant suffered from a heart condition, including hypertension and arrhythmias, which was causally related to stresses in his federal employment. Appellant stopped work on the date of discovery and did not return until April 1, 1974; he missed work intermittently thereafter and ultimately retired due to his cardiac disability on September 25, 1974. On April 24, 1975 the Office accepted appellant's claim for aggravation of hypertensive and arteriosclerotic heart disease. Appellant received compensation from September 26, 1974 until January 22, 1981 when the Office issued a decision terminating compensation effective February 26, 1981, based upon the medical report of Dr. Martin Broder who opined that the accepted aggravation was temporary and ceased when appellant stopped work. On February 25, 1981 appellant requested a hearing which was scheduled for September 23, 1981 but was then denied as being untimely requested. Appellant underwent two-vessel coronary artery bypass graft surgery in June 1981 for exertional angina. On September 23, 1981 appellant requested reconsideration of the denial, and submitted the September 21, 1981 report of Dr. Bernard Charms in support. On January 4, 1982 appellant was hospitalized and on January 27, 1982 he underwent amputation of the fourth toe of his left foot because of gangrene. On January 5, 1982, the Office denied appellant's application for review finding the evidence submitted insufficient and lacking substantial probative value. On January 8, 1982 appellant requested a hearing which was held on May 19, 1982 and by decision dated and finalized July 9, 1982 the Office hearing representative affirmed the January 22, 1981 Office decision terminating compensation. On August 26, 1982 appellant requested reconsideration, the application for which was denied by Office decision dated September 24, 1982 on the grounds that the evidence submitted was cumulative and lacked substantial probative value. Appellant appealed this decision; the appeal was docketed as No. 83-1461

Upon remand the Office referred appellant to Dr. Salvatore J. Ciresi, a Board-certified internist specializing in cardiovascular diseases, to resolve the conflict between Drs. Broder and Charms and for an impartial medical evaluation of appellant's medical record and the statement of accepted facts, and the determination of the permanence and extent of his condition. By report dated January 25, 1984 Dr. Ciresi reviewed appellant's medical history and noted that examination results revealed slight cardiomegaly as demonstrated on x-ray, and atrial fibrillation with a moderately slow ventricular response and nonspecific ST interval changes as demonstrated by electrocardiogram. Dr. Ciresi opined after reviewing appellant's records that appellant had a permanent aggravation of his disability because the initial injury was an irreversible process, and he noted that aggravation from working may have accelerated the disease process and caused a permanent aggravation of the underlying heart condition.

On March 15, 1984 an Office medical adviser reviewed Dr. Ciresi's report and disagreed with the findings that appellant's job stress permanently aggravated the underlying heart condition.

The Office claims examiner found that Dr. Ciresi's impartial medical examination report was not good, and that the Office medical adviser disagreed and gave good rationale to support his opinion, which created a conflict requiring referral to another impartial medical referee. On June 20, 1984 the Office referred appellant to Dr. Khawar M. Syed, a Board-certified cardiologist, for resolution of the conflict in medical opinion between Dr. Ciresi and the Office medical adviser. By report dated June 29, 1984 Dr. Syed reviewed appellant's record, examined appellant, and opined that employment stress and appellant's reaction to that stress might have temporarily aggravated his preexisting cardiac condition, but Dr. Syed noted that the exact cause of coronary artery disease was not totally known.

By letters dated August 22, 1984 the Office requested that Drs. Ciresi and Syed clarify their medical opinions on the relationship of work factors to the aggravation of appellant's heart condition and explain why they felt that the aggravation was either temporary or permanent. By report dated August 28, 1984 Dr. Syed explained that the nature of appellant's job and the stress involved might have temporarily aggravated the underlying coronary artery disease, but he opined that he also noted that the stress per se did not cause heart disease. He also noted that the stress of appellant's job probably temporarily aggravated his condition.

By report dated September 18, 1984 Dr. Ciresi noted as follows:

> "It is my opinion that this person had a natural progression of coronary artery disease while he was working. I do not believe that any aggravation persisted after this person left his work in February of 1974, however, I believe that the aggravation was temporary and the work factor ceased to be an influence on the [appellant's] underlying problem after ceasing work. The work factor along with other documented risk factors that the [appellant] did have did cause irreversible changes in the underlying process by February of 1974."

* * *

> "I do believe that the work influences which ceased in February of 1974 continued to play a role in the claimant's progressive problems until June 1981 when he underwent bypass surgery."

On October 30, 1984 the Office claims examiner found that since Dr. Ciresi's clarification report conflicted with his initial report, his clarification opinion was swayed by the Office medical adviser's report and could not be used to resolve the conflict in medical opinion. The Office claims examiner decided that Dr. Syed's report would be used to resolve the conflict.

By letter decision dated December 6, 1984 the Office rejected appellant's claim for continuing compensation benefits finding that the preponderance of medical evidence established that the aggravation of his accepted condition by factors of his federal employment was temporary and ceased when his employment was terminated.

By letter dated December 10, 1984 appellant requested a hearing before an Office hearing representative on the rejection of his claim.

By memorandum dated April 2, 1985 to the Office the hearing representative advised that the case was not in posture for hearing due to improper procedures used in arriving at the decision to deny the claim. The hearing representative instructed the Office to refer appellant to another impartial medical examiner to resolve the conflict in medical opinion evidence, and that an opinion from an impartial medical examiner was to constitute the weight of the medical evidence. The hearing representative advised that should clarification be needed, it would be requested from the impartial medical examiner rendering the initial impartial opinion, and that the Office medical adviser was only to furnish a close-out memorandum on the report furnished by the impartial examiner. By compensation order that date the hearing representative vacated the prior decision.

By CA-8 form appellant claimed continuing compensation commencing September 24, 1984.

By letter dated May 14, 1985 the Office referred appellant, along with the complete case record and a statement of accepted facts, to Dr. Robert C. Bahler, a Board-certified internist specializing in cardiovascular diseases, for resolution of the conflict in medical opinion evidence.

By letter dated July 29, 1985 Dr. Robert S. Finkelhor, a Board-certified internist specializing in cardiovascular diseases, noted that appellant was "initially scheduled to see us on June 6, 1985, however, this was cancelled because he was leaving for vacation. He was rescheduled for July 18, 1985, however, he could not be adequately evaluated at this time . . . since he had an acute attack of gout. Because of this he has been rescheduled for August 8, 1985."

By report dated September 12, 1985 Dr. Pacifico C. Mercado, a Board-certified family practitioner, noted as follows: "[Appellant] has severe coronary artery disease associated with chronic, recurrent atrial fibrillation for which he is being treated. It is documented medically that atrial fibrillation can be caused by [a] cardiac ailment like coronary artery disease and that notorious atrial fibrillation [can] throw out emboli in any part of the body from the heart. The cause of the gangrene of the left fourth digit of [appellant] which was amputated at the V. A. hospital was due to an embolus that compromised the circulation of said toe that resulted [in] gangrene. The embolization was due to his chronic atrial fibrillation as a consequence of his coronary artery disease."

By letter dated October 9, 1985 the Office advised appellant that he would receive compensation for the period beginning July 1, 1985, the day after his Office of Personnel Management (OPM) retirement benefits were terminated, and it paid appellant the balance of compensation due him over and above his OPM benefits received for the period February 26, 1981 through June 30, 1985.

By report dated February 3, 1986 Dr. Finkelhor noted that appellant had been evaluated on August 8, 1985, reviewed appellant's history and provided the following assessment of his condition:

> "His exam revealed an irregularly irregular pulse averaging 50 to 60 beats per minute. His blood pressure was 160/90 in the right arm. Chest exam showed a right thoracotomy scar and a

median sternotomy scar. His lungs did not have any adventitial sounds. Cardiovascular exam revealed a normal S1 and S2 with a grade 2 over 6 pan systolic murmur at the apex radiating to the axilla. No S3 was detectable. Abdominal exam did not reveal any organomegally. Extremities did not have any edema. . . . He underwent a maximal stress test on August 8, 1985, which was terminated because of an arrhythmia and not because of any patient symptomatology. This arrhythmia was most likely Ashman-type aberrancy. However, ventricular tachycardia (5 beats) could not definitely be excluded from this tracing. . . . This occurred at a work level of 4.8 MET (1.7 MPH, 10 percent incline). It is estimated that his job required 3 or less Metabolic Equivalents.

"In regard to his present disability status, if the arrhythmia we observed was ventricular tachycardia, he should be specifically treated for this. If it is Ashman-type aberrancy, which I suspect it is, then it is benign and requires no specific therapy. He should be considered disabled, if this is not resolved. His atrial fibrillation is most likely secondary to his underlying coronary artery disease and by itself is not a cause of disability or impairment, when it is medically controlled, which it is. . . . From the best available data, coronary artery disease is a progressive disease whose major controllable factors contributing to it are, in descending order of importance: (1) abnormal serum lipids, (2) hypertension, (3) smoking, (4) diabetes, (5) sedentary life style, (6) obesity and (7) the weakest and most controversial being the Type-A personality. It is this last one that emotional stress may interact with. [Appellant] is known to have at least three of the major risk factors: an abnormal lipid profile, smoking history and hypertension. Even though he quit smoking in 1958, his total serum cholesterol remains elevated and his blood pressure, when checked here, was on the threshold of being abnormal. These are almost certainly the main contribution factors to his present medical condition. * * * If [appellant] does have the Type-A personality and if he did find his work emotionally stressful, it would be fair to say that work-related stress could have temporarily exacerbated his condition. This source of stress would have ended when work stopped. However, nonwork-related emotional stresses could have continued to play a minor role in his cardiac disease. It is highly likely that his medical condition would be the same even if he had a different, less stressful job.

> "In summary, psychological stress, secondary to his work, may have had a mild, temporary aggravating effect on his condition. However, this would have ended when he stopped working and other factors could better explain why his cardiovascular condition would be unchanged today, if he had a different job, with a lower level of work-related stress."

By letter decision dated April 21, 1986 the Office rejected appellant's claim for continuing compensation benefits finding that the weight of the medical evidence rested with the impartial medical referee, Dr. Finkelhor, who opined that appellant's employment-related condition had ceased on the date he stopped work.

Appellant's compensation benefits payment ceased effective May 11, 1986.

By letter dated May 2, 1986 appellant requested a hearing before an Office hearing representative on the rejection of his claim. A hearing was held on December 11, 1986 and by decision dated and finalized January 16, 1987 the Office hearing representative affirmed the April 16, 1986 Office decision which denied appellant further compensation finding that although appellant had been referred to Dr. Robert Bahler, appellant was eventually examined by Dr. Robert Finkelhor, a Board-certified cardiologist "chosen to resolve the conflict of medical opinion" whose opinion constituted the weight of the medical evidence and who conducted a thorough examination and opined that appellant's work-related stress caused a temporary aggravation of appellant's underlying heart condition that ceased when he stopped work.

By letter dated May 6, 1987 appellant requested reconsideration and in support submitted an April 30, 1987 report from Dr. Charles D. O'Shaughnessy, a Board-certified internist specializing in cardiovascular diseases, which noted in part as follows:

> "[Appellant] has atherosclerotic heart disease, status post double vessel coronary artery bypass graft surgery, chronic atrial fibrillation, hypertension, restrictive ventilation defect, and status post right upper lobe resection for tuberculosis. [His] exercise capacity is diminished; [he] was only able to walk for 4 minutes, 40 seconds on the treadmill according to the Bruce protocol. [Appellant] is disabled at the present time, due to his various cardiac and pulmonary problems. The cause of atheriosclerosis causing coronary artery disease is unknown. [Appellant] does have hypertension which is one of the major risk factors. [He] apparently was also under a lot of emotional

> stress during his previous employment which certainly can contribute to this problem."

By compensation order dated August 19, 1987 the Office denied modification of the prior order finding the evidence submitted insufficient to warrant modification.

In response to appellant's inquiry about his eligibility for a schedule award for amputation of the fourth toe of his left foot the Office replied by memo dated October 15, 1987 that it had been determined that appellant had no permanent impairment due to any temporary aggravation of his heart condition by factors of his federal employment.

The Board finds that the case is not in posture for decision.

The Board notes that Title 5 U.S.C. section 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." The term "examination" as found in section 8123(a) refers to an actual physical examination of the employee and not just an evaluation of the case record by the third party physician selected as a medical referee to resolve the conflict in medical opinion evidence.[2] Under the Board case law this medical referee is referred to as an impartial medical examiner or an impartial medical specialist. Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, such as Dr. Ciresi's opinion was secured in the instant case, it is improper to send appellant to another medical specialist merely because an Office medical adviser disagrees with the conclusion reached by the impartial specialist.[3] Such an action is open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view.[4] In light of the fact that Dr. Syed's report was improperly obtained by the Office, this report will not be given any weight or consideration by the Board and is subject to the same constraints as those imposed in *Carlton L. Owens.*[5]

The Board notes that the Office hearing representative properly vacated the December 6, 1984 Office decision and appropriately instructed the Office to refer appellant to another impartial medical examiner to resolve the conflict in medical opinion evidence. According to the instructions contained in the Office of Workers' Compensation Programs' Federal (FECA) Procedure Manual Chapter 3–400, Part 3, paragraph 3(a)[6] in cases where there is a conflict in medical opinion evidence the Office will follow a rotation system in contacting and selecting referee specialists to eliminate any possible inference of bias or partiality. Where the rotation system is not used, or where the appellant is not seen by the physician selected by the correct use of the rotation system, the appellant, from his point of view, loses the benefit of the impartiality of medical referee opinion intended under the Act, and any opinion such a physician renders has the appearance of being tainted.[7]

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[2] *Dorothy M. Evans*, 36 ECAB 212 (1984).

[3] *Martin L. Baumgarden*, 37 ECAB 583 (1986).

[4] *Id.* at 589.

[5] 36 ECAB 608 (1985); *See also, Martin L. Baumgarden, supra.*

Under the facts of this case the Board notes that appellant was properly referred to Dr. Robert C. Bahler, a Board-certified internist specializing in cardiovascular diseases, for an impartial medical examination and evaluation to resolve the existing conflict in medical opinion evidence. Appellant, however, was allegedly examined by a female intern or resident and the evaluation report was completed much later by Dr. Robert S. Finkelhor, another Board-certified internist specializing in cardiovascular diseases, who was not selected through use of the FECA Procedure Manual specified rotation system, and therefore the appearance or fact of impartiality of a medical referee's opinion was not maintained as intended under section 8123(a) of the Act. Because Dr. Finkelhor was not the physician selected by the Office to render an impartial medical referee opinion to resolve an existing conflict in medical opinion evidence, his opinion was improperly obtained, cannot be used to resolve the conflict, and does not constitute the weight of the medical evidence in this case. Because the report was improperly obtained, under the law as explained in *Owens*, this report will not be given any weight or consideration by the Board. The Board, therefore, finds that a conflict in medical opinion evidence still exists between Drs. Broder and Charms, which requires the Office to refer appellant, together with his complete case record and a statement of accepted facts, to a Board-certified impartial medical specialist with a list of specific questions to be resolved, for a referee medical opinion on whether factors of appellant's federal employment caused a temporary or a permanent aggravation of his heart condition, and on whether appellant has any permanent impairment as a result of employment-related aggravation of his condition. The referee should also address the cause of gangrene of the fourth left digit which necessitated amputation and its relationship, if any, to the employment factors. After such further development as the Office deems necessary, a *de novo* decision shall be issued.

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[6] Federal (FECA) Procedure Manual, Chapter 3-400, Part 3, paragraph 3 and 3(a) states in pertinent part:

"3. *Specialist Examination of Employee and/or Review of Case File Contents.* The need for this type of examination may arise from actions pursuant to 5 U.S.C. section 8123 and from complex problems in attempting to establish a firm diagnosis. In the first instance the specialist serves as an impartial medical referee. * * *

a. *Medical referee examination.* This type of examination is required in cases where there is a conflict of medical opinion. In contracting specialists, the MA or OMA will follow a rotation system. The services of all available and qualified Board-certified specialists will be used insofar as practicable to eliminate any possible inference of bias or partiality."

[7] *See Leonard Lothlen*, 37 ECAB 314 (1986).

The decisions of the Office of Workers' Compensation Programs dated August 19, 1987, January 16, 1987, and April 16, 1986 are hereby set aside and the case is remanded for action in accordance with this decision, to be followed by the issuance of a *de novo* decision on the merits of the case.

In the Matter of ORLANDO VIVENS *and* U.S. POSTAL SERVICE, POST OFFICE, Denver, Colo.

Docket No. 88-918; Submitted on the Record; Issued July 8, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant's disability beginning January 13, 1987 is causally related to his January 10, 1987 employment injury.

On January 14, 1987 appellant, then a 34-year-old mailhandler, filed a claim for an injury to his upper shoulder and lower back which he attributed to heavy lifting. Appellant listed the dates of injury as July 27, 1982, October 2, 1984, and January 10, 1987. In a January 30, 1987 letter appellant stated that on January 10, 1987 he worked from 7:00 a.m. to 3:50 p.m., that about 6:00 p.m. he felt pain in his shoulders and upper and lower back, and that on his next scheduled work day, January 13, 1987, he had difficulty getting out of bed, arrived 15 minutes late for work, requested and was assigned light duty, and had to leave work that day because of pain in his shoulders and back.

Appellant stopped work at 11:00 a.m. on January 13, 1987.

On January 15, 1987 appellant was examined by Dr. Bennett I. Machanic, a Board-certified neurologist, who stated in a January 19, 1987 report that appellant gave him a history of an employment injury on July 7, 1982 of lifting a mail bag resulting in pain in his neck and shoulder and no work for three months, of missing four months of work in 1984 with neck and shoulder pain, and of a fractured left fibula and left lower back injury on December 6, 1984, when he was struck by an automobile as a pedestrian resulting in disability for work until July 1986, when he returned to light duty, and a return to full duty in August 1986. Appellant told Dr. Machanic that "About five or six days ago, he had a rather distinct exacerbation of pain following a full work day," with the pain occurring in his neck and left lower back and radiating into his shoulders and down his arm and his left leg, and becoming "rather severe" three days ago. After describing his findings on examination, which included muscle spasm in the lower thoracic and lumbosacral areas, Dr. Machanic stated:

> "Diagnostic Impressions
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> "Although there is very little in terms of neurological signs currently, this patient appears to have clinically a rather acute lumbosacral strain and probably does have some radicular symptomatology. I would certainly wonder about an L5 radiculopathy. There seems to be some facet impingement involvement in addition here.
>
> "Disposition
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> "This appears to have been an exacerbation of preexisting problems, and I fear that the patient's course of events for many years now has been remission of symptomatology and subsequent exacerbation on exertion. Some of this may be secondary to faulty lifting mechanics, but some of this may indeed be secondary to underlying significant degenerative disc disease and radicular problems. I would like to obtain old medical records and totally reevaluate the situation. Physical therapy is urgently needed, and this will be started. I think this patient would benefit from a therapeutic exercise program and a back school, but this must be staged and cannot be done yet. I do not feel that he is capable of currently working."

In a January 31, 1987 report Dr. Machanic stated that appellant's range of motion of his back and neck was much better and that he could perform part-time light duty.

Appellant returned to limited duty on February 27, 1987 for four hours per day.

In a February 27, 1987 report Dr. Machanic stated that he had obtained previous medical records and that "myelography done during 1985 did show a central herniated disc at L5–S1." Dr. Machanic had an MRI scan performed on February 6, 1987 and stated that this study showed that appellant's L5–S1 disc was frankly herniated and impinging and effacing the thecal sac and epidural fat primarily on the left, and impinging and entrapping the lateral neural canal on the left. Dr. Machanic performed electromyography and nerve conduction studies on March 2, 1987, and in a March 16, 1987 report stated these studies failed to show signs of lumbosacral radiculopathy. Comparing these findings with those of the MRI scan, Dr. Machanic stated "although the disk can periodically contact the nerve, there is yet no demyelination or profound axonal degeneration. Thus, nerve damage is not yet present. However, there is little question that we are a fraction of a space away from frank disk compression of the nerves." Dr. Machanic further stated that he had no objection to appellant continuing part-time light duty, that he was "truly pessimistic" regarding full recovery, and "any heavy lifting, twisting, pushing or bending with traumatic event is going to result in further disc herniation and then I think frank radiculopathy will occur and then this patient will have no question and need for surgical laminectomy."

By a compensation order dated April 14, 1987 the Office rejected appellant's claim on the basis that he had not submitted the factual or medical evidence needed to establish his claim.

Appellant requested reconsideration and in a May 8, 1987 letter further described the lifting he performed on January 10, 1987, stating that he stacked hampers for about one hour and the other six hours he worked "on the slide lifting heavy sacks which weigh 70 pounds and which [he] believed caused [his] back injury." Appellant submitted a May 4, 1987 report from Dr. Machanic stating:

> "Although he has a long-term problem with his back, he had been capable of working until an on-the-job injury on January 10, 1987, when he was employed as a mail handler. He developed back pain late in the day that date and later had progressive problems from January 11 through January 13. He has responded nicely to therapy here but has not completed and will require some more therapy before maximum medical improvement is reached.
>
> "In summary, as a consequence of his on-the-job injury, he is going to require some additional treatment to allow him to return to work."

By a compensation order dated July 15, 1987 the Office found that the additional evidence was not sufficient to warrant modification of its prior decision.

By a July 15, 1987 letter the Office advised appellant that he should file a claim for an occupational disease if he claimed his condition was related to work factors on more than one shift, and that Dr. Machanic's reports were insufficient to meet his burden of proof because they did not contain a history of the January 10, 1987 injury and because they did not discuss aggravation of his preexisting condition.

Appellant requested reconsideration and stated that the events of January 10, 1987 caused his injury. Appellant submitted medical reports from his hospitalization from December 6 to 10, 1984 for a fractured fibula and multiple abrasions and contusions sustained when he was hit by a car, and of his treatment for low back problems in April and May 1985. In a May 15, 1985 report Dr. Herbert Fried noted that appellant returned to work about two and one-half months after his December 6, 1984 accident and that he developed progressive and fairly constant pain in the lower back with radiation down the left leg with lifting sacks of mail. A lumbar CT scan on May 15, 1985 showed central protrusion of the L5-S1 disc, and a May 15, 1985 lumbar myelogram showed an extradural defect at L5-S1. In a May 16, 1987 note Dr. Fried stated that he did not believe the mild central disc bulge seen on the CT scan was the cause of appellant's back and leg pain, and recommended further physical therapy, job modification, and "only consider laminectomy as ultimate last resort since this type of disc bulge is rarely significant in my opinion."

Appellant also submitted additional reports from Dr. Machanic. In a June 19, 1987 report Dr. Machanic stated that appellant could work six hours per day, and that he "is clearly in remission even though he has some intermittent back pain." In an undated report received by the Office on October 5, 1987 Dr. Machanic stated that the distinct exacerbation of pain following a work day five or six days ago as set forth in his January 19, 1987 report referred to appellant's January 10, 1987 employment injury. Dr. Machanic further stated:

> "Based upon the extensive history I have obtained from the patient, medical records reviewed, numerous consultations with and examinations of this patient, it is my opinion that he suffered an injury during his work shift on January 10, 1987, probably caused by heavy lifting, turning, and throwing of mail bags which he performed on that date. His injury is described as an acute lumbosacral strain, probably with some radicular symptomatology, and some apparent facet impinge-

> ment involvement. This injury aggravated a preexisting condition, which can be described as degenerative disc disease and radicular problems. It is not at all uncommon for such a condition to be aggravated by an acute lumbosacral strain incurred with reference to heavy lifting or other physical exertion, and it appears that that is precisely what happened in this case. I have no way to estimate the duration of this aggravation, but I would note that my recent reports indicate that the patient is doing considerably better, and it may be that the symptoms arising from the accident of January 10, 1987 can be eliminated in the near future, with continued physical therapy. On the other hand, if the symptoms worsen, surgery may be indicated."

In an October 16, 1987 report Dr. Machanic noted that appellant's back hurt intermittently and that on examination he had excellent mobility, negative straight leg raising test, no sensory deficits, and intact reflexes. Dr. Machanic stated that appellant could continue to work six hours per day as he completed his daily tasks well, and that further therapy was not needed.

By compensation order dated December 17, 1987 the Office found that the additional evidence was of a repetitious nature, did not contain a reasoned medical opinion, and was not sufficient to warrant review of its prior decisions.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment. As part of this burden he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation.[1]

The Board finds that appellant has met his burden of establishing that his disability beginning January 13, 1987 is causally related to his January 10, 1987 employment injury.

Dr. Machanic, a Board-certified neurologist, examined appellant five days after his January 10, 1987 employment injury, diagnosed "a rather acute lumbosacral strain" based on findings on examination which included muscle spasm in the lumbosacral area, and stated that appellant was not capable of working. After the Office rejected appellant's claim and advised him that Dr. Machanic's reports were insufficient because they did not describe the January 10, 1987 injury and did not discuss aggravation, appellant submitted a report from Dr. Machanic stating that "he suffered an injury during his work shift on January 10, 1987, probably caused by heavy lifting, turning, and throwing of mail bags which he performed on that date." Dr. Machanic stated that appellant's January 10, 1987 injury was an acute lumbosacral strain, and that it also aggravated his preexisting degenerative disc disease and radicular problems. Dr. Machanic's reports reflect an accurate history of appellant's January 10, 1987 employment injury and an awareness of his previous injuries and back problems.

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[1] *Henry A. Mullins*, 29 ECAB 542 (1978).

Appellant had a low back condition before his January 10, 1987 injury, revealed as a central protrusion of the L5–S1 disc on a May 15, 1985 CT scan. On January 10, 1987 appellant developed back pain two hours after completing his work duties, which consisted of lifting mail sacks weighing up to 70 pounds for six hours. Appellant attributed his back condition and his disability beginning January 13, 1987, his next scheduled work day, to this lifting, as did his treating physician. There is no medical evidence indicating that appellant's disability beginning January 13, 1987 is not causally related to his January 10, 1987 employment injury. In this situation, where the "relative circumstances" strongly suggest a causal relation,[2] and where the medical evidence also supports causal relation, appellant has met his burden of proof.

The decisions of the Office of Workers' Compensation Programs dated April 14, 1987, July 15, 1987, and December 17, 1987 are reversed. The case is remanded to the Office for payment of appropriate compensation beginning January 13, 1987.

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[2] *See Lonnie Lee Whisenhunt*, 32 ECAB 1892 (1981); *Elizabeth Maypother*, 5 ECAB 604 (1953).

In the Matter of FREDERICK HOWARD *and* DEPARTMENT OF THE NAVY, BOSTON NAVAL SHIPYARD, Boston, Mass.

Docket No. 88-786; Submitted on the Record;
Issued July 11, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant had any disability or impairment causally related to his exposure to asbestos while in the performance of duty, thereby entitling him to monetary compensation; and (2) whether the refusal of the Office of Workers' Compensation Programs in a November 20, 1987 decision to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. section 8128(a), constituted an abuse of discretion.

This is the second appeal in this case. In the first appeal[1] the Board, by a decision dated April 28, 1987, set aside an April 29, 1986 decision of the Office of Workers' Compensation Programs and remanded the case for further development. The Board noted that Dr. Joseph Pines, the Board-certified internist of professorial rank with a subspecialty in pulmonary disease to whom the Office referred appellant for a current evaluation, concluded that there was no conclusive evidence of asbestos disease other than evidence of pleural thickening, and that appellant's disability for work could be attributed to his obesity and obstructive lung disease. The Board found that Dr. Pines did not provide any medical rationale to support his conclusion that appellant's obstructive lung disease was the cause of appellant's inability to perform the duties of an electrician as opposed to his restrictive lung disease, represented by pleural thickening. The Board noted that it was necessary for Dr. Pines to provide such an explanation since he had reported that appellant's pulmonary function studies revealed moderate restrictive and obstructive ventilatory impairment. The Board further found that Dr. Pines did not, by making references to the results of pulmonary function studies, explain how or why appellant's dyspnea and reduced diffusing capacity were related to the obstructive component of appellant's pulmonary condition, and to which he attributed appellant's disability. In view of the foregoing deficiencies, the Board directed the Office on remand to secure a rationalized medical opinion addressing whether appellant had any pulmonary disability or impairment and if so, whether such impairment or disability could be attributed to his nonemployment-related obstructive lung disease or to his employment-related restrictive lung disease. The Board noted that should the Office determine that both the obstructive and restrictive lung diseases contributed to appellant's impairment and disability, no attempt should be made to separate the percentages of impairment of either lung disease. The Board further directed the Office to refer appellant for additional pulmonary function studies, if necessary, should the Office determine that appellant's employment-related restrictive lung disease contributed to his pulmonary impairment or disability. Further, the Board directed the Office to determine whether appellant's accepted condition of pulmonary asbestosis prevented him from continuing in his former position of an electrician, and if so, whether it adversely affected his loss of wage-earning capacity. A *de novo* decision was to follow any further development.

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[1] Docket No. 86-1798 (issued April 28, 1987).

The facts and circumstances surrounding the prior appeal are contained in the Board's decision and are hereby incorporated by reference.

On remand, the Office referred the case record, a statement of accepted facts, a list of questions, and a copy of the Board's April 28, 1987 decision outlining the Board's instructions on remand, to Dr. Pines for a supplemental opinion. The Office also advised Dr. Pines that he was authorized to reevaluate appellant if he deemed it necessary.

In a supplemental opinion dated June 29, 1987, Dr. Pines reported as follows:

> "Pulmonary function tests obtained on 22 August 1985 were improved from those of 29 May 1984 and appeared to represent his baseline function without further reversibility. The chest x-ray had remained stable without evidence of an interstitial infiltrate and with a small amount of bilateral pleural thickening. The arterial oxygen tension on room air was slightly reduced (72), consistent with ventilation-perfusion and diffusing capacity impairment. The PC02 and pH were normal. Measurement of the diffusing capacity showed no change from 1984 and was 66 percent of the predicted value. It was my feeling at that time that the predominant pulmonary problem was emphysema. The spirometric findings, the diffusing capacity and the slight hypoxemia were all consistent with this process. Though emphysema is predominantly an obstructive disease, the vital capacity is usually at least slightly reduced (see the enclosed copies of sections from the *Textbook of Pulmonary Diseases* edited by Gerald L. Baum, M. D. and *Respiratory Function In Disease* by David V. Bates and Ronald V. Christie.) The mild amount of pleural thickening seen on chest x-ray seemed to be too slight to account for the restrictive pathology by itself. Because of this, it was my feeling that his respiratory disability was due to emphysema and *not* to the pleural thickening seen and accepted as due to asbestos exposure. (Emphasis in the original).
>
> "In reply to your questions, a reduced diffusing capacity is characteristic of emphysema because of loss of small blood vessels and membrane surface area as part of the disease. Dyspnea, the subjective awareness of shortness of breath, can be

> due to many things. In this case it is due to the increased work of breathing necessitated by the ventilatory impairment described above. The oxygen level obtained at rest does not suggest sufficient hypoxemia to be causing shortness of breath in and of itself. Since it is my feeling that the ventilatory impairment is due to emphysema predominantly, with superimposed obesity, it was my feeling that the shortness of breath was also due to this process. Again, taken by itself, the pleural thickening did not appear to be sufficient to be causing marked restrictive lung disease and shortness of breath on this basis.
>
> "In summary, I think that Mr. Howard's disability is due to emphysema and obesity. I do not think that the pleural thickening is contributing significantly to his ventilatory impairment."

By compensation order dated July 28, 1987, which incorporated a memorandum summarizing the evidence, the Office made the following finding:

> "[B]ased on the weight of medical evidence the condition of pleural thickening is ACCEPTED and the claim for compensation is REJECTED because the weight of medical evidence supports the condition of pleural thickening as being causally related to asbestos exposure while it does not support any disability since the disability was found to be obstructive in nature due to emphysema with superimposed obesity and not causally related to asbestos exposure."

In a letter of September 2, 1987 appellant, through his attorney, requested reconsideration of the Office's decision, contending that Dr. Pines did not offer a definitive response to the questions posed by the Board on remand and, accordingly, the responses were vague and ambiguous. The attorney explained that Dr. Pines' report implies that the employment-related restrictive component of appellant's pulmonary condition, i.e., pleural thickening, contributed to his pulmonary problems. He suggested the Office's decision be reversed or in the alternative that appellant be referred for another pulmonary evaluation.

By letter dated September 21, 1987 the Office informed appellant that the contentions his attorney raised "appear to have been considered in the decision of July 28, 1987 and these may be insufficient to warrant review of that decision." The Office allotted appellant 15 days within which to submit additional evidence.

Neither appellant nor his attorney submitted any additional evidence within the time allotted.

By compensation order dated November 20, 1987, which incorporated a memorandum summarizing the evidence, the Office denied appellant's application for review, finding that the submitted evidence was "repetitious and was not of such character as to make an arguable case for error." In the accompanying memorandum, the Office explained:

> "The arguments presented by Attorney Kehoe are found to be without merit for he is making a medical determination and is not qualified to do so. Furthermore, the issue of whether claimant's pleural thickening contributed to his present disability was extensively addressed by the District Office prior to the issuance of the July 28, 1987 *de novo* decision.
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> "There has been no new evidence or contentions submitted, nor has Attorney Kehoe presented an arguable case for error in fact or law. In summary, the material submitted in connection with the request for reconsideration was primarily repetitious of assertions and evidentiary matters previously considered by the District Office and was not of such character as to make an arguable case for error."

The Board finds that the evidence of record establishes that appellant did not have any disability or impairment causally related to his exposure to asbestos while in the performance of duty; therefore, he is not entitled to monetary compensation.

On prior appeal, the Board found that the case was not in posture for decision because the Office referral physician,[2] Dr. Pines, a Board-certified internist of professorial rank with a subspecialty in pulmonary disease, did not clarify his prior reports with respect to whether appellant's disability was causally related to either appellant's restrictive lung disease—pleural thickening, obstructive lung disease, or to contribution by both, or explain the significance of the pulmonary function studies revealing restrictive and obstructive ventilatory impairment. On remand, the Office sought clarification from Dr. Pines. In a thorough and rationalized report dated June 29, 1987 Dr. Pines concluded that appellant's disability was due to his emphysema and obesity. Dr. Pines explained that, based on his review of the pulmonary function studies obtained on August 22, 1985 and comparing them with the May 29, 1984 results, he concluded that appellant's "predominant pulmonary problem was emphysema as the spirometric findings, diffusing capacity and the slight hypoxemia were consistent with this process." The doctor pointed out that although emphysema "is predominantly an obstructive disease," the vital capacity "is usually at least slightly reduced"; the doctor attached excerpts of medical texts to support his theory. The doctor further explained that the "mild amount of pleural thickening seen on chest x-ray seemed to be too slight to account for the restrictive pathology by itself." He concluded, therefore, that appellant's respiratory disability was caused by the emphysema and not the pleural thickening accepted as secondary to asbestos exposure. Dr. Pines explained further that a reduced diffusing capacity was indicative of emphysema because of a loss of small blood vessels and membrane surface area and that appellant's dyspnea was caused by the ventilatory impairment due to emphysema with superimposed obesity as the "oxygen level obtained at rest" was not suggestive of sufficient hypoxemia to cause shortness of breath. In view of the foregoing, the doctor concluded that appellant's pleural thickening was not sufficient alone to cause marked restrictive lung disease and shortness of breath.

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[2] The Board notes that, although in the memorandum to the Director which was incorporated into the Office's July 28, 1987 decision the Office referred to Dr. Pines as an impartial medical examiner, the Board had held in its April 28, 1987 decision that Dr. Pines was not properly designated as an impartial medical examiner because he was selected to resolve a variance in medical opinion between two Office referral physicians, Dr. Kenneth J. Einstein and Dr. David J. Kanarek, both of whom were Board-certified internists with a subspecialty in pulmonary disease, regarding their respective interpretations of x-rays. The Board explained that this was not the classic conflict situation as provided for in 5 U.S.C. section 8123(a) involving a disagreement in opinion between an employee's physician and a physician selected by the Office as the disagreement was between two Office physicians. *See Frederick Howard*, Docket No. 86-1798 (issued April 28, 1987). Thus, the Board concludes that the Office improperly referred to Dr. Pines as an impartial medical examiner in its memorandum; however, such designation does not constitute reversible error as his report is dispositive of the issue and the Board has already ruled on the matter. (See 20 C.F.R. section 501.6).

The Board notes that Dr. Pines' report was based on his review of all of the tests he had conducted and the remainder of the evidence of record and that his conclusion was supported by sound medical reasoning. Accordingly, the Board finds that his report is dispositive of the issue.

The Board further finds that the refusal of the Office, in its November 20, 1987 decision, to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. section 8128(a) did not constitute an abuse of discretion.

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128. Accordingly, as is well-established under Board precedent, the Office is required to reopen a case on its merits when such evidence or contentions are presented.[3] Thus, material which is repetitious or duplicative of that already in the case record is of no evidentiary value and does not constitute a basis for reopening a case.[4]

To support his reconsideration request appellant, through his attorney, submitted a letter contending that based on his interpretation of Dr. Pines' report, he believed that the doctor concluded that the restrictive component of appellant's pulmonary condition contributed to his disability, together with the obstructive component. He suggested that the Office reverse its decision or refer appellant to another pulmonary specialist. The Board notes that neither appellant nor his attorney submitted any relevant evidence not previously of record. The Board further notes that neither appellant nor his attorney advanced any legal contentions not previously considered. The Board finds that since Dr. Pines' report was dispositive of the issue of whether appellant had any disability or impairment causally related to his exposure to asbestos while in the performance of duty, appellant's attorney's contentions that Dr. Pines' report failed to resolve the issue are repetitious or duplicative of those already advanced as the doctor has now clarified his prior opinions and has concluded that appellant's pulmonary impairment is due to his emphysema and obesity. Hence, the Office properly declined to reopen the case based on the contentions raised in appellant's attorney's letter.

The decisions of the Office of Workers' Compensation Programs, dated July 28, 1987 and November 20, 1987, are hereby affirmed.

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[3] *Ethel D. Curry*, 35 ECAB 737 (1984).

[4] *Maria Z. DeGuzman (Amadeo DeGuzman)*, 35 ECAB 309 (1983).

In the Matter of John Constantin *and* U.S. Postal Service, Post Office, St. Louis, Mo.

Docket No. 88-878; Submitted on the Record;
Issued July 12, 1988

Before George E. Rivers, David S. Gerson, Michele von Kelsch

The issue is whether appellant has more than a 15 percent permanent impairment of his right lower extremity for which he received a schedule award.

On November 24, 1984 appellant, then a 58-year-old letter carrier, filed a claim alleging that on November 23, 1984 he slipped and fell on "some slippery substance" while walking along his delivery route. Appellant alleged that he sustained a bruised and twisted right knee. He stopped work on November 24, 1984 and returned to work on December 17, 1984.

Appellant sought medical treatment from Dr. Donald Brancato, a Board-certified orthopedic surgeon, on December 21, 1984 and filed a claim of recurrence on that day, alleging recurrence of disability as of December 20, 1984. Appellant returned to work on January 14, 1985. Appellant filed a second recurrence claim on January 15, 1985 alleging a recurrence of disability as of that date; he thereafter returned to work on March 11, 1985.

On January 16, 1985 Dr. Brancato initially diagnosed a possible torn cartilage of the right knee with popliteal cyst. On January 24, 1985 Dr. Brancato performed an arthroscopic procedure following which he diagnosed severe degenerative changes with flat chondral tears of the medial and lateral femoral condyle, partial degenerative tear of the anterior cruciate of the lateral side, fragmenting changes of the meniscus, and a popliteal cyst of the right knee.

The Office of Workers' Compensation Programs accepted appellant's claim for torn medial and lateral femoral condyle of the right knee and the surgery of January 4, 1985, on April 9, 1985.

On April 26, 1985 the Office received appellant's claim for a schedule award.

On December 23, 1985 the Office claims examiner requested that Dr. Brancato examine appellant and provide an opinion as to the date of appellant's maximum improvement and the percentage of appellant's permanent loss of use of the lower right extremity. On January 15, 1986 Dr. Brancato reported as follows:

> "This patient was here for the evaluation for the workmen's compensation injury on 1/7/86. He does have continued complaints of pain in the right leg and in the left trochanteric bursa. The findings at this time are normal.
>
> "At this time he has full range of motion, but does complain of pain. There are no sensory changes, no obvious muscle atrophy, as he measures 20 inches at 10 inches above the medial prominence of the tibial plateau. The findings and history are concurrent with the arthroscopy for the severe degenerative changes of the right knee with almost complete loss of the articular cartilage in both medial and lateral femoral condyles. This would indeed be very painful.

> "There are no objective criteria at this time to substantiate the findings other than some varus valgus laxity probably due to the cartilage loss. I have therefore suggested that he get a cybex test to validate some functional losses probably due to guarding.
>
> "It is felt that with the physical findings and surgery, I would rate this at approximately 20 percent permanent/partial disability to the right knee. This is from the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment from the American Academy of Orthopedic Surgeons. I feel that the combination of the physical findings and the complaints of pain should be taken into consideration in the evaluation of the disability."

On February 6, 1986 the Office claims examiner, by letter, requested that Dr. Brancato use the American Medical Association's *Guides to the Evaluation of Permanent Impairment* in evaluating the degree of appellant's impairment. On February 24, 1986 Dr. Brancato advised that he has always used the Manual for Orthopedic Surgeons in Evaluating Permanent/Physical Impairment, which is published by the Academy of Orthopedic Surgeons. On March 17, 1986 the Office requested that Dr. Brancato submit the cybex test results, which he had referred to in his letter of January 15, 1986. On April 2, 1986 the cybex test record was submitted and revealed a greater decrease in torque and endurance values for the right knee than would be "normal" for appellant's age group, with right side changes greater than left.

On April 10, 1986 the Office claims examiner requested that the Office medical adviser review the case record and compute the percentage of appellant's loss of use of the lower right extremity. On May 9, 1986 the medical adviser reported that the date of appellant's maximum medical improvement was January 15, 1986. The doctor further commented:

> "(Using the A.M.A. *Guides*): I do not find Dr. Brancato's 20 percent impairment of the lower extremity to be unreasonable taking into account the pain, loss of articular cartilage of the medial and lateral femoral condyles and mild loss of sustained strength as measured by cybex testing."

On July 25, 1986 the Office requested that the medical adviser state how he computed the 20 percent impairment of the right lower extremity. On August 21, 1986 the Office medical adviser responded that an impairment rating medical examination should be obtained by a physician who used the A.M.A. *Guides*.

On April 24, 1987 the Office referred appellant and the case record to Dr. James Stiehl, a Board-certified orthopedic surgeon, for examination and evaluation.

On April 28, 1987 appellant claimed a recurrence of his November 23, 1984 injury. Appellant's supervisor also noted on the claim form that appellant was retiring on May 31, 1987 and was only claiming medical expense.

On June 2, 1987 Dr. Brancato submitted Office progress notes which indicated that he had examined appellant on April 28, 1987, May 5, 1987 and May 19, 1987. On April 28, 1987 the doctor noted that appellant had right knee effusion from arthritic and degenerative changes in the knee. On May 5, 1987 the doctor noted that appellant's right knee was improved. On May 19, 1987 the doctor noted that appellant currently had a "large" click in the right knee and that he may have peeled off more articular cartilage. The doctor concluded that since appellant had recurrence of swelling, limitation of flexion, and additional joint effusion, rearthroscopy of the right knee was suggested.

On May 21, 1987 Dr. Stiehl reported as follows:

> "This is a 60-year-old letter carrier who fell initially on 11-23-84 injuring his right knee."
>
> * * *
>
> "The patient says that he walks about 10 miles a day. He had some difficulty when he walks up and down stairs. He has swelling at times with pain. He denies any giving way. He says that the right leg is definitely weaker than his left.
>
> "Physical examination is done in our office and limited to findings of the right knee. The patient has a normal gait. He was unable to do hopping exercises as he felt this would cause discomfort. Range of motion of the right knee was zero to 140 degrees of flexion. No extension lag was noted. Ligaments appear to be stable with normal varus-valgus stress test. Anterior posterior drawer was negative. Lachman's sign is negative. Mild pain on patellar femoral compression was noted. No jointline tenderness could be localized. No tenderness about the patellar joint was seen. We measured thigh circumference six inches above the superior pole of the patella and it was 17 and one half inches on the right side and 17 and one half inches on

> the left side. Range of motion of the left knee was assessed and is zero to 145 degrees.
>
> "We obtained x-rays of the right knee which revealed significant degenerative changes, but the joint spaces appear to be well maintained.
>
> "Impression: I believe this patient has a permanent partial disability of 10 percent of his right lower extremity. This is based on six percent loss of motion compared to the opposite normal side and four percent due to pain and persistent symptoms in his knee. It is likely that the marked degenerative changes in the right knee are preexisting problems, and thus, I do not feel would be relevantly related to making his disability more severe."

On June 18, 1987 the Office medical adviser reviewed Dr. Stiehl's report and reported that the date of appellant's maximum medical improvement was May 21, 1987. The medical adviser also stated appellant had severe preexisting degenerative arthritis of the right knee, with nearly complete loss of articular surfaces. The doctor noted that appellant had a five degree loss of flexion of the right knee compared with the left knee, equalling a two percent impairment of loss of use of the lower extremity. Commenting on the degree of impairment due to pain, the medical adviser stated, "while no peripheral nerve is involved, the continuing degenerative process manifested by intermittent effusions would qualify for the four percent (impairment) as recommended." Commenting on loss of strength, the medical adviser noted, "While [appellant] feels the right leg is less strong than the left, Dr. Stiehl found no atrophy, extension lag, loss of sensation, or other evidence to support an additional award in this area." The medical adviser concluded that appellant had a six percent right lower extremity impairment.

By compensation order dated July 15, 1987 the Office awarded appellant a schedule award for a six percent loss of use of the right leg. The Office also found that the maximum date of appellant's medical improvement was May 21, 1987.

On September 2, 1987 appellant requested reconsideration of the July 15, 1987 compensation order and submitted a report from Dr. Terry Weis, an osteopath, dated August 25, 1987. Dr. Weis reported as follows:

> "The above-captioned patient was examined by me in my office on August 17, 1987. He states that on November 23, 1984, while at work he fell and hurt his right knee. In January, 1985

> he had arthroscopic surgery and excision of a popliteal cyst and has had some improvement of his knee since his surgery, but continues to have intermittent swelling, popping, catching giving away of the knee. He has had a progressive increase in the amount of his symptoms where the patient can no longer work due to the pain. He has taken nonsteroidal, anti-inflammatories without relief of his symptoms. It hurts for him to bear weight, to bend the knee and has a dull achy pain into the left hip. He has popping, snapping, and giving away without locking. It hurts for him to fully flex and extend the knee joint. Rest seems to alleviate his symptoms. He denies other joint pain, paresthesias, anesthesias, loss of range of motion of joints, muscle cramps or tenderness. Physical examination revealed a cooperative, well-oriented times three, well-nourished, well-hydrated, . . . male in no acute distress. There was zero to 100 degrees range of motion of the left knee joint, with no gross atrophies or deformities. There is no knee effusion. There is crepitation beneath the patella, with flexion, extension of the knee joint. The medial joint line is tender to palpation. There is no neurologic deficit to fine touch in either lower extremity. McMurray sign was negative. Apley sign was negative. Lachman and Drawer signs were negative. The Q angle was unremarkable. X-rays from February 1987 and April 1987 were reviewed and there is early patella femoral arthritis with no evidence of loose body.
>
> "Diagnosis at this time was that of patella femoral arthritis, chondromalacia of the patella, synovitis of the right knee.
>
> "At the time of this examination, I believe this patient has a permanent partial disability of 25 percent of the right knee as a result of the injury which he received at work on November 23, 1984, relating to the American Medical Association's *Guides to the Evaluation of Permanent Impairment.*"

On September 11, 1987 the Office medical adviser reviewed Dr. Weis' report and commented that he had only provided the range of motion of the left knee. The medical adviser requested that the Office obtain the range of motion of appellant's left knee compared to the right knee. On September 15, 1987 Dr. Weis reported that the zero to 100 degrees range of motion measurement was actually of the right knee joint, rather than of the left knee joint. On September 24, 1987 the Office requested that Dr. Weis provide the range of motion of the left knee, compared to the right knee. On September 30, 1987 Dr. Weis reported that appellant's left knee range of motion was zero to 130 degrees and his right knee range of motion was zero to 100 degrees.

On October 13, 1987 the medical adviser was requested to review the new medical evidence and advise the Office of the percentage of appellant's loss of use of the right lower extremity. On October 15, 1987 the Office medical adviser reported that Dr. Weis did not appear to use the A.M.A. *Guides* in an understandable manner, however, based on Dr. Weis' physical examination of appellant, appellant had a 30 degree loss of range of motion of the right knee, compared to the left knee, equalling an 11 percent impairment. The doctor also noted that secondary to degenerative arthritis and loss of the articular surface on the femoral condyles, appellant had a five percent impairment for pain. The medical adviser then concluded that no other neuromuscular findings were delineated and that appellant had a 15 percent impairment of the right lower extremity.

By compensation order dated November 17, 1987 the Office modified the previous order of July 15, 1987 and awarded appellant a schedule award for 15 percent permanent partial disability of the right leg.

The Board finds that the case is not in posture for decision.

For consistent results and to insure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A. *Guides* have been adopted by the Office as a standard for evaluating schedule losses, and the Board has concurred in such adoption.[1] Among the elements which may be considered in determining the extent of impairment are loss of motion, pain and weakness.

Appellant was referred to Dr. Brancato for evaluation of the degree of his knee impairment, based on the A.M.A. *Guides*. On January 15, 1986 Dr. Brancato reported that appellant had approximately a 20 percent permanent disability of the right knee, calculated pursuant to the *Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment*, from the American Academy of Orthopedic Surgeons. Dr. Brancato's impairment calculation cannot be accepted because he did not utilize the A.M.A. *Guides*, the uniform standard applicable to all claimants.

On May 9, 1986 the Office medical adviser reviewed Dr. Brancato's report and stated that he did not find Dr. Brancato's 20 percent impairment calculation to be unreasonable. Although the medical adviser stated that he utilized the *Guides* to reach his conclusion, he gave no explanation of his computations, and in a subsequent report recommended that an impartial medical examination be obtained by a physician using the A.M.A. *Guides.* Since the May 9, 1986 report from the medical adviser did not show how he utilized the appropriate criteria from the *Guides* to compute appellant's impairment, his conclusions can be given little weight.[2] Likewise, Dr. Stiehl on May 21, 1987 reported that appellant had a 10 percent disability of the right lower extremity; however, the doctor did not state that he had utilized the *Guides* in his computation or explain how he computed the percentage impairment, if indeed he did utilize the *Guides.* Thus, Dr. Stiehl's report is likewise of little probative value.

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[1] *Thomas P. Gauthier*, 34 ECAB 1060 (1983).

On June 18, 1987 the medical adviser reviewed Dr. Stiehl's report and calculated a six percent impairment of appellant's right lower extremity, again without mention of calculations performed utilizing the A.M.A. *Guides.* Likewise, Dr. Weis' report of August 25, 1987 is flawed because, although the doctor claimed to have used the A.M.A. *Guides* in his computation of appellant's impairment, he did not specify how he used the *Guides* in his calculations.

Finally, on October 13, 1987 the Office medical adviser reviewed the examination findings reported by Dr. Weis on August 25, 1987, and after applying the *Guides,* calculated that appellant had a 15 percent impairment of the right lower extremity. The medical adviser, however, did not properly utilize the *Guides,* in his calculations. In calculating appellant's loss of range of motion of the right knee, the medical adviser stated that there was a 30 degree loss of flexion compared to the left knee, and then assigned an 11 percent impairment for 30 degrees loss of flexion. The A.M.A. *Guides,* however, indicate that the range of flexion of the knee is 150 degrees.[3] In calculating a schedule award, all claimants must be measured against this range of motion, even if an individual claimant's normal range of motion may be greater or lesser than the range of motion contained in the A.M.A. *Guides.* It is only by using this range of motion that the Office can reach consistent results in schedule award determination.

Basing schedule awards on the loss of the motion from an individual claimant's own range of motion injects too much variability into the calculation of schedule awards and would result in inconsistent awards, defeating the purpose of adoption of uniform standards.[4] Furthermore, utilizing the range of motion measurements provided for by the *Guides* allows the incorporation of preexisting impairment, which may be symmetrically present in both of the appellant's extremities.[5] Appellant's range of motion of the right knee was restricted to 100 degrees according to Dr. Weis and the medical adviser, entitling appellant up to an 18 percent impairment award pursuant to the *Guides*, Table 37, p. 38.

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[2] *See Chester A. Szukalski,* 30 ECAB 681 (1979).

[3] A.M.A. *Guides* Table 37, p. 38.

The Board also notes that the medical adviser awarded appellant a five percent impairment for pain. The medical adviser, however, did not specifically comment on Dr. Weis' finding of patella femoral arthritis, which may provide up to 20 percent impairment, pursuant to Table 38, Chapter 1 of the *Guides*.

On remand, the Office should refer the case to the Office medical adviser and request that he clarify his opinion on the extent of appellant's impairment of the right knee based on the range of motion specified in the A.M.A. *Guides* and on the other factors of appellant's impairment, as provided in the *Guides*. The Office medical adviser shall be requested to state which Tables were utilized in his calculations. After such further development as it may find necessary, the Office should issue a *de novo* decision.

The November 17, 1987 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded to the Office for further development in accordance with this decision.

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[4] *Frank Vara, Jr.*, 38 ECAB 434 (1987).

[5] The Federal Procedure Manual of the Office provides that preexisting impairments of the scheduled member shall be calculated into the percentage of impairment of that member. Federal (FECA) Procedure Manual, Chapter 3-600, page 1.

In the Matter of MARJORIE S. GEER *and* DEPARTMENT OF JUSTICE, MANAGEMENT DIVISION, Washington, D.C.

Docket No. 87-998; Hearing July 6, 1988;
Issued July 21, 1988

Appearances: *William J. Snyder, Esq.*, for appellant; *Catherine P. Carter, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant is entitled to reimbursement of expenses incurred for chiropractic treatment.

On April 20, 1983 appellant, then a 27-year-old administrator, filed a claim for injuries to her legs, knees and back which she sustained on April 19, 1983 when she fell down a flight of stairs at work. Appellant stopped work on April 19, 1983 and was initially treated by Dr. Michael Shefferman, her family physician, on April 20, 1983. Dr. Shefferman referred appellant to Dr. Bruce Ammerman, a Board-certified neurologist, who diagnosed lumbar strain with radiculopathy and right lower extremity discomfort. He related appellant's condition to the April 19, 1983 employment injury. Dr. Ammerman admitted appellant to the hospital from May 17 to May 24, 1983 at which time she underwent a course of pelvic traction and physiotherapy. A lumbar CAT scan and lumbar myelography were performed at the time, both of which were noted to be unremarkable. In a June 10, 1983 report Dr. Ammerman stated that examination on that date showed appellant to be "completely asymptomatic of lower extremity discomfort" and that she had "almost complete flexion/extension of the lumbar spine without spasm, tenderness or scoliosis." The doctor noted that appellant had recently returned to work.

Appellant subsequently submitted an October 13, 1983 report from Dr. Christopher Frey, a chiropractor. Dr. Frey noted that he initially examined appellant on June 4, 1983. Dr. Frey stated the proper history of injury and his findings on physical examination. He further reported that x-rays showed "eight degree right convex rotoscoliosis between C7 and T6 with a compensatory eight degree left convex scoliosis between T6 and L4." He diagnosed "post traumatic serial distortion of the axial skeleton with paraspinal myospasm in the lower extremity, disesthesia and hyperthesia complicated by multiple vertebral subluxations." In conclusion, Dr. Frey stated that appellant was given three follow-up treatments and was released from care on August 8, 1983. He opined that her "symptoms were resolved at that time," all clinical signs were normal and she had "reached a maximum medical rehabilitation."

On March 1, 1984 the medical record was reviewed by an Office medical adviser who stated that there was no information to support a diagnosis of subluxation.

By compensation order dated April 2, 1985 the Office rejected appellant's claim for reimbursement of expenses for chiropractic treatment by Dr. Frey.

On April 30, 1985 appellant requested a hearing before an Office hearing representative.

In a decision dated August 22, 1985 the hearing representative vacated the Office's April 2, 1985 decision and remanded the case for further development of the medical evidence. The hearing representative found that a conflict existed between Dr. Frey and the Office medical adviser on the issue of subluxation. On remand the Office was instructed to refer the case file and x-rays to a Board-certified radiologist for resolution of the conflict.

The case file and x-rays, along with the Office's definition of "subluxation," were reviewed by Dr. Eugene Jacobs, a Board-certified radiologist.[1] In a report dated April 16, 1986 Dr. Jacobs opined that there was "no subluxation of the spine demonstrated on the submitted x-rays."

By compensation order dated May 1, 1986 the Office rejected appellant's claim for reimbursement of chiropractic expenses on the ground that x-rays failed to establish that a subluxation of the spine existed.

On May 17, 1986 appellant requested a hearing before an Office hearing representative. Appellant also requested that Dr. Jacobs be subpoenaed to appear. In a letter dated August 6, 1986 the Office denied appellant's request to subpoena Dr. Jacobs on the ground that his "testimony [was not] relevant in this case since chiropractic treatment by Dr. Frey was not authorized by the Office." At the October 1, 1986 hearing appellant testified that the employing establishment had advised her of the limitations of a chiropractor under the Act, prior to treatment by Dr. Frey. She further testified that she had not sought authorization from the Office to obtain treatment by Dr. Frey.

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[1] FECA Bulletin No. 84-71 states that the Office has adopted the definition of spinal subluxation as set forth in the *Medicare Carriers Manual*, which defines a subluxation as "an incomplete dislocation, off-centering misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays."

In a decision dated and finalized November 12, 1986 the hearing representative affirmed the Office's May 1, 1986 decision on the ground that appellant "procured the services of a chiropractor without requesting prior authorization from the Office."

The Board finds that the Office properly denied appellant reimbursement for unauthorized chiropractic treatment.

The Office is required by section 8103 of the Federal Employee's Compensation Act to provide all medical care necessary as a result of an employment injury. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Act also provides that appropriate medical care be furnished by or on the order of physicians designated or approved by the Office and that appellant be allowed the initial choice of physician.[2] The Board notes that this does not restrict the Office's power to approve appropriate medical treatment obtained after the initial choice of physician and without prior authorization from the Office. The Office has broad discretionary authority in the administration of the Act and must, in fact, exercise such discretion to achieve the objectives of section 8103.

In *Richard Bowen,*[3] the Board implied that, in the absence of an emergency, an employee is not entitled to recover for the cost of medical treatment from a physician other than the initially chosen physician without prior approval from the Office. The Board modifies *Bowen* to reflect that while appellant is not entitled to reimbursement of unauthorized medical care as a matter of right, the Office nevertheless has the discretionary authority to approve unauthorized medical care which it finds necessary and reasonable and is required to exercise that discretion.

In the instant case the Office's task was twofold: first to determine whether the services of Dr. Frey, a chiropractor, constituted medical treatment under the Act; and if so, whether such treatment was reasonable and necessary pursuant to the Act.

Section 8101(2) of the Federal Employees' Compensation Act[4] provides that chiropractors' "reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."

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[2] 5 U.S.C. section 8103.

[3] 33 ECAB 1015 (1982).

[4] 5 U.S.C. section 8101(2).

Dr. Frey reported that he treated appellant for "post-traumatic serial distortion of the axial skeleton with paraspinal myospasm in the lower extremity, disesthesia and hyperthesia complicated by multiple vertebral subluxations." He stated that x-rays supported this diagnosis. An Office medical adviser reviewed the medical record and opined that it contained "no information to support a diagnosis of subluxation." The Office subsequently determined that a conflict existed between Dr. Frey and the Office medical adviser with regard to whether or not appellant sustained a subluxation of the spine. To resolve this conflict the Office referred the case record and appellant's x-rays to Dr. Jacobs, a Board-certified radiologist, for an impartial review.[5] Dr. Jacobs opined that the submitted x-rays "exhibit a minimal degree of scoliosis which would not be considered clinically significant in an adult and which cannot be considered to be caused by the April 19, 1983 incident." He stated: "There is no subluxation of the spine demonstrated on the submitted x-rays." As the impartial specialist in this case, Dr. Jacobs based his opinion on a review of the record, appellant's x-rays and the *Medicare Carrier's Manual* definition of subluxation. His opinion constituted the weight of the medical evidence and established that appellant's x-rays did not demonstrate a subluxation of the spine.[6] Consequently, Dr. Frey is not a physician and his services cannot be considered reimbursable medical treatment under the Act.

The Board finds, therefore, that the Office exercised due discretion in evaluating whether or not to reimburse appellant for the cost of Dr. Frey's unauthorized services and properly denied such reimbursement. Since Dr. Frey's services cannot be considered medical treatment under the Act, the question of whether his services were reasonable and necessary under the Act becomes moot.

The decision of the Office of Workers' Compensation Programs dated November 12, 1986 is hereby affirmed.

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[5] 5 U.S.C. section 8123(a) states in pertinent part: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[6] *James P. Roberts*, 31 ECAB 1010 (1980).

In the Matter of RAYMOND D.K. LAU *and* DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, Honolulu, Hawaii

Docket No. 88-993; Submitted on the Record;
Issued July 25, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant has a pulmonary condition that is causally related to his asbestos exposure in his federal employment.

On July 29, 1985 appellant, then a 64-year-old retired general engineer, filed a notice of occupational disease, alleging that he sustained pulmonary asbestosis during the course of his federal employment. Appellant stated that he first became aware of and realized that his condition was caused or aggravated by his employment on December 31, 1984. The employing establishment indicated that July 15, 1976, the date of appellant's retirement, was the date of appellant's last exposure to asbestos.

In support of his claim appellant submitted a December 31, 1986 report from Dr. Carl P. Hallenborg, a Board-certified internist specializing in pulmonary diseases. Accompanying Dr. Hallenborg's report were results from pulmonary function studies and an October 15, 1984 x-ray report noting a possible coin lesion but no asbestos markers. Dr. Hallenborg's report, based on a November 9, 1984 examination, noted appellant's family history of diabetes and high blood pressure and his occupational asbestos exposure history, noting "heavy" exposure from 1940 to 1952 and during most of the period from 1952 to 1976. Dr. Hallenborg noted the manner in which appellant was exposed to asbestos and also his history of cigarette smoking. On examination Dr. Hallenborg noted a sputum-producing cough as appellant's chief complaint and stated that there were no "significant respiratory symptoms" except for some shortness of breath upon light exercising. Dr. Hallenborg noted the physical examination to be unremarkable except for "rales in the left side of the chest, worse than the right." Dr. Hallenborg commented that appellant's "history and physical examination [was] quite disturbing for the presence of a cough productive of blood." After reporting the x-ray results, noted above, Dr. Hallenborg discussed the pulmonary function tests performed on his behalf. Dr.

Hallenborg reported that the tests showed normal lung volumes and a diminished diffusing capacity, to 70 percent of predicted, and "intact" flow rates. He commented that laboratory tests showed a "possible" malignant chest lesion in addition to the diminished diffusing capacity. In his impression, Dr. Hallenborg diagnosed a "heavy" exposure to asbestos, pulmonary asbestosis secondary to asbestos exposure, probable lung cancer, and controlled hypertension. Dr. Hallenborg stated that the undiagnosed chest mass and the "brownish sputum which may be blood," produced by appellant's cough, were "extremely disturbing." He opined that these conditions were related to appellant's asbestos exposure. Dr. Hallenborg noted appellant's current condition to be "functional" but noted a "clouded" future because of appellant's possible lung cancer.

In March 18, 1986 and July 6, 1987 letters, appellant listed the periods of employment in which he was exposed to asbestos. He also noted exposure to carbon tetrachloride from 1940 to 1952 and a history of smoking "approximately" 15 cigarettes daily from 1945 to 1950.

In a June 3, 1987 letter, the employing establishment listed appellant's different jobs from 1940 until his 1976 retirement. The employing establishment contended that in the course of appellant's employment, his contact with asbestos materials was considered "low." The employing establishment stated that there was no environmental data obtained on appellant. In a July 20, 1987 letter, the employing establishment contended that appellant had exaggerated the extent of his asbestos exposure. The employing establishment did note that appellant was exposed to asbestos but cited the October 15, 1984 x-ray report which showed no asbestos markers in support of its position that appellant was exposed to low levels of asbestos.

By letter dated August 10, 1987, the Office of Workers' Compensation Programs referred appellant, together with the medical record and a statement of accepted facts, to Dr. Edward J. Morgan, a Board-certified internist specializing in pulmonary diseases.

In an August 22, 1987 report, Dr. Morgan noted appellant's medical and asbestos exposure history. He noted appellant's recent history of bronchitis and "panting" when walking up an incline. After summarizing the findings in Dr. Hallenborg's report, Dr. Morgan noted, in an otherwise unremarkable physical examination, "a few trivial crackles" heard in the mid-axillary areas that "completely cleared with a modest cough and further deep breaths." Dr. Morgan reported chest x-rays to be "essentially normal," although he did note some scarring or a "pulmonary infiltrate abutting the pleura on the right" and some "slight" hyperlucency, particularly in the upper lung zones in addition to calcification of the aortic notch. Dr. Morgan stated that pulmonary function studies performed for him on August 19, 1987 showed all values to be above the 95 percent confidence interval, although he did note appellant's single breath diffusing capacity to be "trivially reduced below the 95 percent confidence interval at 95 percent of the 95 percent confidence interval." Dr. Morgan diagnosed a "minimal" past history of cigarette smoking, a moderate past history of exposure to asbestos-containing compounds, a trivial reduction in single breath diffusing capacity, infiltrate on chest x-ray of unknown cause, and mild shortness of breath of unknown etiology. In discussing the etiology for appellant's condition, Dr. Morgan noted appellant's evaluation to be "essentially" normal except for the coin lesion in appellant's chest and small dots of blood that appeared several weeks earlier when appellant had been diagnosed as having bronchitis. Dr. Morgan opined that appellant was "negative" for any asbestos-related disease, noting x-rays that did not show any significant pleural changes or interstitial lung disease. As to appellant's "trivially" reduced single breath diffusing capacity, Dr. Morgan opined that this condition could be due to "numerous causes" and that it was not expected to cause any impairment. Dr. Morgan found it "not immediately clear" why appellant developed episodes of bronchitis and occasionally coughed mucus. However, he opined, based on "reasonable speculation," that these episodes may be related to sinus infection or to chronic bronchitis due to his history of dusty work conditions and cigarette smoking. Dr. Morgan noted no impairment in accordance with the "A.M.A. classification." In his conclusion, Dr. Morgan noted that appellant's controlled hypertension and beta-blocker medication may have caused appellant's tiredness and shortness of breath. He found "no obvious evidence of an asbestos-related disease." Dr. Morgan recommended that appellant undergo a computed tomography scan to clarify questions raised by appellant's previous coin lesion and occasional "flecks" of blood found in his sputum.

In an October 6, 1987 supplemental report, Dr. Morgan reported appellant's computed tomography scan of that date to be "entirely normal." Dr. Morgan reported that the scan revealed no pulmonary nodule, pleural thickening, plaques or any processes that might be attributed to appellant's history of asbestos exposure. Dr. Morgan recommended that appellant receive annual evaluations because of his symptoms of breathlessness.

By compensation order dated December 1, 1987, the Office rejected appellant's claim for monetary and medical benefits on the ground that the weight of the medical evidence had not established that appellant had sustained a pulmonary condition resulting from his employment-related asbestos exposure. An accompanying memorandum noted that Dr. Morgan's report established that appellant had no condition, disability, or impairment due to asbestos exposure.

By letter dated February 16, 1988, appellant requested reconsideration. Appellant requested that annual medical examinations be authorized, and he submitted a January 30, 1988 letter from Dr. Morgan recommending that appellant undergo such an examination.

By letter compensation order dated March 7, 1988, the Office denied appellant's application for review on the ground that the application was *prima facie* insufficient to warrant review of the December 1, 1987 Office decision. The decision noted that Dr. Morgan's letter was not considered to be evidence establishing that appellant had an asbestos-related condition.

The Board finds that the case is not in posture for decision because of a conflict in the medical evidence.

The American Medical Association's *Guides to the Evaluation of Permanent Impairment* (2nd ed.) have been adopted by the Office and approved by the Board as an appropriate standard for evaluating schedule losses under the Federal Employees' Compensation Act.[1] The guidelines adopted by the Office for the evaluation of impairment in asbestos-related claims establish that the "[m]easured reduction in lung function is the basis for determination of pulmonary impairment" and that ". . . for compensation purposes, pulmonary impairment exists when the actual level of pulmonary function is reduced below an arbitrary level which is considered as the lower limit of 'normal.'"[2] The A.M.A. *Guides* have established a table consisting of classes of respiratory impairment. Under this table, if any one of the tests of ventilatory function, specifically FVC, FEV_1, FEV_1/FVC or VO_2 Max, is below the lower limits of normal for the predicted value as defined by the 95 percent confidence interval, the individual falls into one of the classes of respiratory impairment. Table 1, Classes of Respiratory Impairment, provides a Class I (zero percent) impairment when tests of ventilatory function are above the lower limit of normal for the predicted value as defined by the 95 percent confidence interval, and a Class II (10–25 percent) mild impairment when the tests of ventilatory function are below the 95 percent confidence interval but greater than 60 percent of the predicted value.[3]

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[1] *Aaron Crenshaw*, 35 ECAB 686 (1984).

[2] See Federal (FECA) Procedure Manual, chapter 2-806, at 58 and 45 (August 1981).

In this case, an Office medical adviser failed to calculate respiratory impairment, pursuant to the *Guides*, from the pulmonary function studies performed for Drs. Morgan and Hallenborg. However, the medical evidence from Dr. Morgan indicates a Class I (zero percent) impairment based on appellant's pulmonary function studies performed for Dr. Morgan on August 19, 1987.[4] Dr. Morgan noted appellant's pulmonary function tests to be "normal" with "all values above the 95 percent confidence interval." Dr. Morgan concluded, in his October 6, 1987 report, that appellant's evaluation revealed "virtually no evidence of an asbestos related disorder." Although Dr. Morgan noted a "trivial reduction" in appellant's single breath diffusing capacity, he opined that this should not cause any abnormal signs or symptoms.

However, application of the standards found in the *Guides* to the pulmonary function studies performed for Dr. Hallenborg on November 9, 1984 indicates a Class II (10 to 25 percent) impairment.[5] Dr. Hallenborg's December 31, 1984 report noted appellant's employment and asbestos-exposure history and also noted findings based on laboratory testing and physical examination. Dr. Hallenborg stated that pulmonary function test showed "normal lung volumes," intact flow rates but a "diminished diffusing capacity to 70 percent of predicted." Dr. Morgan concluded that appellant had sustained pulmonary asbestosis secondary to asbestos exposure.

The Board finds that there is a conflict in the medical evidence between the opinions of Dr. Morgan and Dr. Hallenborg because there is nothing in the medical record to explain the discrepancy in the pulmonary function studies performed for each physician. The case must therefore be remanded for referral of appellant, together with the case record and a statement of accepted facts, to an appropriate impartial specialist for an examination and an opinion as to whether appellant has a respiratory or pulmonary impairment causally related to his federal employment.[6]

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[3] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (2nd ed. 1984), Table 1, at 86. *See also* pages 85–100.

[4] Appellant's forced vital capacity (FVC) of 3.40 liters is within normal limits after subtracting the 95 percent confidence interval (1.115) from his predicted FVC of 4.140 liters. His forced expiratory volume in the first second (FEV_1) of 2.70 liters per minute is within the normal limits after subtracting the 95 percent confidence interval (.842) from his predicted FVC_1 of 3.240 liters per minute. His FEV_1/FVC ratio of 81 percent is within normal limits after subtracting the 95 percent confidence interval (8.28) from his predicted FEV_1/FVC ratio of 78.40 percent.

[5] Appellant's observed forced vital capacity (FVC) of 3.05 liters is below the limits of normal (3.085) after the 95 percent confidence interval of 1.115 is subtracted from his predicted FVC of 4.20. The observed 3.05 value, however, is greater than 60 percent of the predicted FVC value of 4.20 liters (2.52) and places appellant into Class II, 10–25 percent pulmonary impairment. Similarly, appellant's observed forced expiratory volume in the first second (FEV_1) of 2.38 liters per minute is below the limits of normal (2.478) after the 95 percent confidence interval of .842 is subtracted from his predicted FEV_1 value of 3.32. The observed 2.38 liters per minute value, however, is greater than 60 percent of the FEV_1 predicted value of 3.32 liters per minute (1.992) and places appellant into Class II, 10–25 percent pulmonary impairment. His FEV_1/FVC ratio was within normal limits under this testing.

The December 1, 1987 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further development of the record, to be followed by a *de novo* decision.

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[6] 5 U.S.C. section 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In the Matter of KENNETH R. MCCABE *and* U.S. POSTAL SERVICE, SALT LAKE CITY MANAGEMENT SECTIONAL CENTER, Salt Lake City, Utah

Docket No. 88-493; Submitted on the Record;
Issued July 25, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant's left hand injuries which occurred at his temporary living quarters on July 4, 1986 were sustained in the performance of duty.

On September 28, 1986 appellant, then a 55-year-old director of human resources, filed a schedule award claim for injuries to his left hand, which included amputation of his ring finger, middle finger and the tip of his little finger. Appellant stated that the injury occurred on July 4, 1986 while he was mowing the lawn of his temporary living premises. Appellant stated that he was living in the temporary quarters while preparing to relocate.

In response to a request from the Office of Workers' Compensation Programs, appellant submitted an April 24, 1986 relocation order authorizing appellant's relocation from Sacramento, California to Salt Lake City, Utah and the payment for his temporary living quarters for his first 60 days in Salt Lake City. In a subsequent letter dated December 1, 1986 appellant stated that the injury occurred on July 4, 1986, a scheduled holiday. Appellant further noted that he was on fully-paid expense status at that time and that he was reimbursed for the rental of his temporary living quarters. He contended that he was entitled to a schedule award because "the accident would not have not occurred if he had not been on travel status due to [employing establishment] reorganization" and he "would not have had to borrow a lawn mower." Appellant enclosed copies of brochures from the employing establishment showing that all expenses for temporary living expenses were reimbursable. He further enclosed copies of bills he paid while in temporary living quarters and copies of reimbursements from the employing establishment.

The employing establishment submitted a December 2, 1986 accident report regarding appellant's July 4, 1986 injury. In a second letter of the same date, the employing establishment stated that mowing a lawn is not in appellant's normal employment activity. The employing establishment further stated that at the time of the accident appellant was in 24 hour-a-day travel status and that all his housing and expenses were paid by the employing establishment prior to his permanent relocation.

By compensation order dated December 23, 1986 the Office rejected appellant's claim on the ground that his left hand injuries were not sustained while he was in the performance of his federal employment duties.

On March 3, 1987 appellant requested reconsideration. Appellant stated his employment "brought [him] to Salt Lake City and exposed [him] to the risk of borrowing the mower;" that mowing the lawn of the rental residence was "necessary and incidental to the relocation;" and that although the owner of the property had hired a boy to mow the lawn, appellant decided to mow it "since [he] had nothing better to do."

By compensation order dated April 28, 1987 the Office denied modification of its prior decision on the ground that the evidence submitted was not sufficient to warrant modification.

The Board finds that appellant has failed to establish that his left hand injuries which occurred on July 4, 1986 were sustained in the performance of duty.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition is causally related to factors of his federal employment. Where an employee is on a temporary duty assignment away from his regular place of employment, he is covered by the Federal Employees' Compensation Act 24 hours a day with respect to any injury that results from activities essential or incidental to his temporary assignment.[1] However, when the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.[2]

In the instant case the employing establishment confirmed that appellant was sent to Salt Lake City, Utah to permanently relocate there and that on the date of his injury he was considered to be in travel status since his permanent relocation had not yet been accomplished. The employing establishment also confirmed that "mowing the lawn" was not within the scope of appellant's employent duties. The Board notes that the property owner had hired someone to mow the lawn and that appellant admitted he performed the task "given he had nothing better to do." Consequently, the Board finds that "mowing the lawn" was not an activity "reasonably incidental to" appellant's employment and that therefore the left hand injuries he sustained were not employment related.

The decision of the Office of Workers' Compensation Programs dated April 28, 1987 is hereby affirmed.

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[1] *Cherie L. Hutchings*, 39 ECAB —— (Docket No. 88-505, issued March 24, 1988).

[2] *See Richard Michael Landry*, 39 ECAB 232 (1987). And the cases cited therein.

In the Matter of LAWRENCE E. BENNETT *and* U.S. POSTAL SERVICE, POST OFFICE, Floral Park, N.Y.

Docket No. 87-1555; Submitted on the Record;
Issued July 28, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant's disability commencing April 28, 1986 was causally related to his federal employment.

This is the second appeal in this case. In a decision and order dated October 24, 1986, the Board affirmed a decision of the Office of Workers' Compensation Programs dated June 10, 1986 which rejected appellant's claim for compensation benefits on the ground that no rationalized medical evidence of record established that appellant's disability, commencing April 28, 1986, was causally related to his federal employment. Appellant failed to meet his burden of proof. The facts and background of the case are fully set forth in the Board's prior decision and are hereby incorporated by reference.[1]

Appellant, on February 24, 1987, requested reconsideration and submitted his own affidavit describing the injury and a medical report from Dr. Ralph Hirschhorn dated January 12, 1987.

Appellant, in his affidavit dated December 10, 1986, provided an additional history of injury as follows:

> "After making a mail delivery to 18 Stewart St., Floral Park, N. Y. I walked back to the sidewalk. I then pivoted on my left leg to continue to the next delivery. As I pivoted, my left knee collapsed and I fell. Feeling a great deal of pain and discomfort in the knee, I rested for a short time and then proceeded to finish my route. . . ."

Dr. Hirschhorn, in his report dated January 12, 1987 reported as follows:

> "Please be advised that this patient has been under our care since April 28, 1986. On that date he sustained an injury during the course of his work. He felt a popping sensation. This is clearly stated in the initial consultation, copy of which is enclosed for convenience and completeness.
>
> "As indicated the initial diagnosis was a partial tear of the medial meniscus in the left knee and with persistent symptomatology he subsequently had arthroscopic surgery carried out which confirmed the diagnosis of a torn medial meniscus. This was done on 7/2/86 and a copy of the operative procedure is also included.
>
> "This quite obviously was a definitive diagnosis as confirmed during arthroscopic surgery. There is no speculation involved. The condition quite obviously was produced during the course of work from a specific incident and was clearly documented in the initial history obtained on the date of injury. During the periods of treatment and convalescence, the patient was unable to perform his work. He returned to work more recently following a satisfactory convalescence.
>
> "In reviewing this case, it is a clear cut case with causal relationship clearly present and a completely definitive diagnosis established at arthroscopic surgery. There should be no conceivable reason for dispute."

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[1] Docket No. 86-1772 (issued October 24, 1986)

Dr. Hirschhorn, in his April 28, 1986 report had noted appellant's history of injury as:

> "This patient was walking on his letter route today when he felt a sudden popping or snapping sensation in the left knee medially. He has had no previous warning of difficulty. He had pain and limp since that time."

On April 14, 1987 the Office, after merit review, denied modification of its June 10, 1986 decision on the grounds that appellant's history of injury provided in the affidavit, that he pivoted on the left leg immediately before hearing and feeling a popping in the left knee, differed from the history appellant had previously provided, that his left knee had collapsed as he walked. The Office also found that the medical evidence submitted with appellant's affidavit did not provide rationale or history supporting the claimant's new statements.

The Board finds that appellant has failed to establish that he had any disability causally related to his federal employment.

An award of compensation may not be based on surmise, conjecture, speculation, or on appellant's belief that his condition was caused by his employment. The mere fact that a condition manifests itself or is worsened during a period of employment does not raise an inference of causal relation between the two. Appellant has the burden of establishing by reliable, probative, and substantial evidence that his disability was causally related to specific employment incidents or to specified conditions of employment. To meet this burden he must submit rationalized medical evidence of causal relation based on a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.[2] Appellant has not submitted such evidence.

In the present case appellant submitted an affidavit dated December 10, 1986 which provided a new history of the alleged April 28, 1986 injury as, "[a]fter making a mail delivery . . . I walked back to the sidewalk. I then pivoted on my left leg to continue to the next delivery. As I pivoted, my left knee collapsed and I fell. . . ." Appellant also submitted an additional medical report from Dr. Hirschhorn dated January 12, 1987. However Dr. Hirschhorn does not provide a history of the pivoting incident in either his January 12, 1987 report nor in his original contemporaneous consultation note dated April 28, 1986. Furthermore Dr. Hirschhorn's report of January 12, 1987 provides only a conclusion on the issue of causal relationship and no statement with medical rationale which describes the causal relationship between appellant's employment activities and his knee condition. Appellant has not met his burden of proof by submitting rationalized medical evidence of causal relationship based upon a specific and accurate history of employment incidents or conditions which were alleged to have caused the disability.

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[2] *Susie F. Hall*, 34 ECAB 1311 (1983).

The decision of the Office of Workers' Compensation Programs dated April 14, 1987 is hereby affirmed.

Michael J. Walsh, Chairman, dissenting:

This is claimant's second appeal to the Board. In the first appeal appellant submitted three medical reports in support of his claim. The Board determined these were insufficient to meet his burden of proof. In this new appeal the record discloses a report dated June 12, 1987 from Dr. Ralph Hirschhorn, a Board-certified orthopedic surgeon, in which the doctor recites his treatment from date of injury, a history of the injury, a working diagnosis of a tear of the medial meniscus left knee, persistent symptomatology, subsequent arthroscopic surgery, confirmation of the diagnosis and a strong statement on the issue of causation stating:

> "This quite obviously was a definite diagnosis as confirmed during arthroscopic surgery. There is no speculation involved. The condition quite obviously was produced during the course of work from a specific incident and was clearly documented in the initial history obtained on the date of injury."

It is pointed out by the majority that in a December 10, 1986 affidavit the claimant provided additional history of the injury and from this it is inferred that because Dr. Hirschhorn did not have this additional history or mention it in his subsequent report, the report may be based on a faulty supposition.

I find no obvious inconsistencies in the elaborated-upon history contained in the December 1986 affidavit and his initial explanation that his left knee suddenly popped and snapped and collapsed while walking his mail route.

Dr. Hirschhorn's report is the fourth document of medical evidence in the record supporting the claim. These office notes and reports are the only medical evidence in the record and at the least constitute *prima facie* evidence of injury.

While it may be argued Dr. Hirschhorn's last report has diminished probative value because it lacks sufficient rationale, I find that his cumulative reports coupled with an absence of contrary evidence are sufficient to require further development of this case.[3]

I would set the decision of the Office of Workers' Compensation Programs dated April 14, 1987 aside and remand the case to the Office for further proceedings consistent with this opinion.

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[3] *Louis L. Kilbourne*, 27 ECAB 97 (1975); *Horace Langhorne*, 28 ECAB 829 (1978).

In the Matter of WILLIE C. CHRISTIAN *and* U. S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, Seattle, Wash.

Docket No. 87-510; Submitted on the Record;
Issued July 29, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's cardiovascular condition on and after October 15, 1984 was causally related to his April 1981 accepted myocardial infarction or to factors of his federal employment.

On May 11, 1981 appellant, then a 50-year-old area office director of federal contract compliance programs for the Employment Standards Administration, filed a notice of occupational disease alleging that on March 17, 1981 he became aware that he had a coronary artery condition which he alleged was causally related to the tension and stress of his position. Appellant stopped work on March 20, 1981 and sought medical treatment that date from Dr. Fred E. Cleveland, Jr., a Board-certified internist specializing in cardiovascular diseases, who immediately hospitalized appellant for probable acute onset angina pectoris. Appellant remained hospitalized until March 25, 1981; coronary angiography performed on appellant while hospitalized revealed a 70 percent obstruction of the proximal left anterior descending artery and a 70 percent proximal obstruction of the circumflex artery, neither of which were felt to constitute a threatening arterial lesion. Appellant was followed up by Dr. Cleveland as an out-patient but did not return immediately to work.

Appellant was seen again on April 9, 1981 complaining of anginal pain when lying down with poor relief from nitroglycerin. He was rehospitalized the next day and admission studies revealed the presence of an acute anterior wall myocardial infarction with a modest degree of complicating congestive heart failure and bifascicular heart block. Appellant was subsequently stabilized and was discharged on April 24, 1981; he did not return to work full time until June 26, 1981.

In a May 22, 1981 report Dr. Cleveland noted that appellant was seen as an out-patient on May 11, 1981 without continued symptoms of angina on modest physical activity or congestive heart failure. At that time Dr. Cleveland advised appellant to improve his stamina through a walking program and not to return to work; Dr. Cleveland opined that appellant's "illness was aggravated by stress" but noted that he was less certain that stress was an etiologic agent.

On June 3, 1981 the Office of Workers' Compensation Programs received appellant's statement, including general conditions of his employment that he considered responsible for his illness. Appellant noted that imposed suspense dates and time frames, difficult negotiation and conciliation agreements with contractors in the area of equal employment, and interfacing with lawyers and contractors who were opposed to equal employment opportunity were all employment conditions that were stressful. He further noted that in addition:

> "Area Office Directors (my position) are responsible to the Assistant Regional Administrator for all reports to be submitted correctly and on time as per the performance standards. . . . The Area Office Director is responsible for 80 percent of compliance reviews or complaint investigations [which] are identified through notice of deficiency or show cause notice [and are to be] resolved through conciliation . . . or referral to Solicitor for enforcement.
>
> "All actions on a compliance review or an investigation have specific time frames and suspense dates; the Area Office Director is responsible to the Assistant Regional Administrator to see that all of these time frames and suspense dates are met.
>
> "The total operation of the Area Office is the responsibility of the Area Office Director.
>
> "This stress is eight or more hours per day and five or more days per week."

On June 10, 1981 an Office medical adviser reviewed Dr. Cleveland's report, noted appellant's diagnosed condition as anterior wall myocardial infarction complicated by bifascicular heart block and congestive heart failure, and opined that appellant's condition was not aggravated, accelerated, precipitated, or proximately caused by conditions of his employment. The Office medical adviser opined that, although uncomplicated myocardial infarctions usually require six weeks for recovery, appellant's condition was more complicated and would require longer.

By letter dated June 12, 1981 the Office requested that appellant submit further rationalized medical evidence on causal relation and a detailed narrative of specific factors of his federal employment which he felt contributed to his condition.

By report dated August 24, 1981 Dr. Cleveland noted as follows:

> "While the definition of stress and its relationship to cardiovascular hemodynamics and the alterations thereof is a difficult one to encompass in a meaningful sense, it is my opinion that those elements of the lives of patients which constitute stress impose a demand for increased cardiac output and increased cardiac rate which in the presence of impaired coronary circulation produces an at-risk factor. In terms of those elements of [appellant's] employment which might be related to such an increased demand, there is no question that deadlines and imposed time frames would constitute additional stress. In addition, negotiations relating to any aspect of the work which he was responsible for overseeing in which there was a disagreement would add to the stress. Finally, I would deem it a stressful situation to be interfacing with lawyers and contractors who might well have different philosophies relating to those which were supposed to be in effect in federally supported building activities."

By letter dated August 31, 1981 appellant submitted a statement detailing the specific conditions with which he was faced when he began work as an Area Office Director at the employing establishment on January 28, 1980. Appellant noted that just before he began work there a staff assistant visit documented the following practices adversely affecting workload accomplishments:

> 1. Lack of concern for compliance with suspense dates and disregard for completing activities within required time frames on the part of Equal Opportunity Specialists.

2. Inadequate suspense controls employed by the Area Office management.

3. Lack of work accomplishment recorded at the Area Office Director's level.

4. Failure to request and justify extensions.

5. Failure to maintain review chronologies.

6. Failure to maintain accurate records of when Affirmative Action Plan requests are received by the contractor (affects ability to track timely receipt of AAP's accomplishment of desk audits).

7. Failure to require submissions of AAP or complete standard compliance review reports in at least one review action. Failure to issue acceptance letters in at least one instance.

8. Failure to learn and apply the Women Equity Action guidance.

9. Module Chiefs were waiting until conclusion of reviews before auditing Affirmative Action Plans found acceptable by Equal Opportunity Specialists.

10. Failure to assign pre-award reviews to Equal Opportunity Specialists in a timely manner.

11. Scheduling of new reviews despite pending incomplete workload.

Appellant stated that the National Office recommended a variety of remedies, most of which entailed the Area Office Director taking personal responsibility for tracking, monitoring, quality assurance, and insuring that all objectives were met on a continuing basis. Appellant stated that the previous Area Director had been removed because of heart problems, and that since being assigned to the office appellant had to have treatments for a peptic ulcer that was reactivated by the stress of the job. Appellant additionally recounted the conditions of employment previously identified with explanations as to how he was involved with dealing with them. Appellant also noted an average workload of about 110 actions being investigated at one time at the office and the deficiencies of his staff. On September 18, 1981 appellant additionally submitted a June 11, 1981 report from Dr. Cleveland which noted that appellant was initially seen in June 1980 for complaints of a duodenal ulceration and offered the opinion that "any factor inducing additional loads of stress upon [appellant] places him at increased risk for further symptomatology related to the disease process."

The Office determined that a conflict in medical opinion evidence existed between Dr. Cleveland and the Office medical adviser, and by letter dated September 28, 1981 the Office referred appellant, together with a statement of accepted facts and the complete medical record, to Dr. Robert N. Levenson, a Board-certified cardiologist, for evaluation of the complete record and statement of accepted facts, examination of appellant, and an impartial analysis of the relationship of appellant's angina and myocardial infarction, by direct causation, aggravation, precipitation, or acceleration, to factors of his federal employment, and for an opinion on any permanent impairment of his federal employment.

By report dated October 21, 1981 Dr. Levenson reviewed the facts, appellant's medical history, and the case record, noted that appellant was examined on October 19, 1981, and opined as follows:

> "It is clear from [appellant's] story and from the material provided by you and by Dr. Fred Cleveland, that [appellant] had the disease of atherosclerosis of his coronary arteries and that this in time led to his myocardial infarction. It is also clear that his blood pressure has been elevated for an indeterminate period and that he was a cigarette smoker. Both of these are recognized 'risk factors' for the development of coronary artery disease. In addition, however, he was working in a setting that had been recognized as stressful by his attending physician prior to the onset of his heart disease. By description it seems clear that the time factors and the dealings that he had with the various employers and attorneys could be extremely stressful. Thus, while it is clear that he had sufficient disease in his coronary arteries to lead to what ensued with the myocardial infarction, it should also be recognized that stress is considered as a risk factor for the development of coronary artery disease. In my opinion, [appellant's] disorder was related to his coronary artery disease which in turn was probably accelerated by the use of cigarettes, that his job stresses over several years must have played a significant additional role."

Dr. Levenson further noted that although appellant continued to have a significant lesion of his coronary circumflex artery as identified by angiography which might at some time lead to another myocardial infarction, he presently did not have any significant functional impairment or limitations which would preclude him from resuming work, particularly of a less stressful nature.

On January 12, 1982 the Office medical adviser reviewed Dr. Levenson's report and opined that appellant's coronary artery disease risk factors included hypertension, smoking and a Type–A personality as manifested by his diagnosed peptic ulcer disease. The Office medical adviser noted that he disagreed with Dr. Levenson's opinion, noting that it was still speculative to say that chronic stress can lead to coronary artery disease.

By memorandum dated January 15, 1982 the Office noted that the Office medical adviser was Board-certified in internal medicine without a subspecialty and decided that greater weight must be accorded Dr. Levenson's opinion because Dr. Levenson was an impartial cardiologist selected to resolve a conflict in medical opinion. By letter dated January 18, 1982 the Office accepted appellant's claim for a myocardial infarction.

On November 30, 1984 appellant filed a claim for recurrence of disability commencing October 15, 1984, causally related to his accepted heart condition. Appellant stopped work on October 15, 1984 and sought medical treatment that date from Dr. Lucius D. Hill, a Board-certified thoracic surgeon of professorial rank. In a November 5, 1984 report Dr. Hill noted that "appellant recently developed occlusion of the superficial femoral artery in the left leg that created severe claudication that was incapacitating. He had a femoral-popliteal bypass graft placed to bypass this obstruction. This operation was done on October 15, 1984. He has recovered from this. . . . The occlusion in the femoral artery is an extension of the vascular process that caused the obstruction of the coronary artery. This obviously is the same process and also may well be stress-related as was the cardiac problem as well as the ulcer." A CA-17 from Dr. Hill submitted along with the claim noted that appellant was totally disabled from October 15 until November 9, 1984 and partially disabled thereafter until November 16, 1984; Dr. Hill noted that appellant would be able to resume full-time work on November 19, 1984.

By letter dated December 4, 1984 appellant stated that since returning to work in June 1981 he had performed his duties, paying strict attention to situations that he felt might induce an overamount of stress, and stated that he had enrolled in a stress management course under the supervision of a psychologist. On January 15, 1985 an Office medical adviser reviewed appellant's record and opined that the left superficial femoral artery occlusion was not related to the original accepted myocardial infarction in any manner, noting that it was due to atherosclerosis. The Office medical adviser opined that emotional stress does not influence the development of peripheral vascular disease.

By letter dated March 13, 1985 the Office advised appellant that the medical evidence of record was not sufficient to establish a relation between his superficial femoral artery occlusion and his originally accepted condition of myocardial infarction. The Office noted that it had not accepted the condition of underlying cardiovascular disease as being related to factors of his federal employment.

By report dated June 17, 1985 Dr. Hill noted that the relationship between appellant's femoral-popliteal bypass graft surgery to ensure the continued viability of his left extremity and appellant's accepted myocardial infarction was that they were "precisely the same disease. He had an occlusion in his coronary arteries and this was followed by occlusion in the femoral arteries which is part of the same process." Dr. Hill also enclosed appellant's operative report from the bypass surgery.

On August 6, 1985 the Office medical adviser reviewed Dr. Hill's report and opined that appellant had generalized atherosclerosis first, followed by coronary artery disease, then peripheral vascular disease, none of which were related to stress. The Office medical adviser noted that had appellant's left femoral artery occlusion been due to an embolism from the heart, then it would have been related.

On August 14, 1985 the Office determined that a conflict in medical opinion evidence existed and referred the case record to Dr. Gerald I. Shugoll, a Board-certified cardiologist, for a written report on his findings after he reviewed the statement of accepted facts and complete case record.

By report dated August 23, 1985 Dr. Shugoll noted appellant's history of sustaining an acute myocardial infarction in 1981 following a period of angina pectoris which was accepted as being work related, and of undergoing a left femoral-popliteal arterial bypass graft surgery for an occlusion of the left superficial femoral artery following symptoms of claudication for a period of several months. Dr. Shugoll noted as follows:

> "It is clear that [appellant] had atherosclerosis of his superficial femoral artery that led to his surgery. Although this is the same disease process that also occurred in his coronary artery causing his myocardial infarction, there is no connection between the occurrence of his myocardial infarction in 1981 and his superficial femoral artery occlusion in 1984. There is no accepted medical evidence that the basic disease of atherosclerosis is in any way related to employment factors or stress, even though the precipitation of angina pectoris and occasionally myocardial infarction can be related to stress factors. The fact

> that he developed the occlusion of his superficial femoral artery only indicates that the underlying disease process was present, as it commonly is in multiple arteries, and is more likely to occur in patients with risk factors such as hypertension and smoking which this patient had. Although an acute myocardial infarction can result in [an] intracardiac clot which can embolize to a peripheral artery, this only occurs during the phase of the acute infarction and does not occur three years later. Thus, there is no relationship, in my opinion, between the claimant's acute myocardial infarction and the occlusion of his superficial femoral artery that occurred three years later, except for the basic disease process that is in common [with] both conditions, and which itself is not known to be caused or accelerated by job stresses."

By compensation order dated October 7, 1985 the Office rejected appellant's claim for recurrence of disability, finding that the weight of the medical evidence was represented by the opinion of Dr. Shugoll, who opined that there was no causal relationship between appellant's femoral artery occlusion in 1984 and his myocardial infarction in 1981.

By letter dated October 18, 1985 appellant requested a hearing before an Office hearing representative on the rejection of his claim.

A hearing was held on January 15, 1986 at which appellant testified. During the hearing appellant read into evidence a January 9, 1986 report from Dr. Hill which noted as follows:

> "[Appellant] had a femoral-popliteal bypass graft for [an] occluded femoral artery. This patient had previously had a myocardial infarction which was accepted as being stress related because he did have a stressful job. As Dr. Gerald Shugoll says in his letter, the precipitation of angina pectoris and myocardial infarction can be related to stress factors. This is absolutely true. In fact, stress is listed in all of the programs dealing with myocardial infarction as one of the precipitating factors of this disease. As Dr. Shugoll further indicates in his letter, the disease process in the coronary arteries is exactly the same process [as] in the femoral arteries and since the myocardial infarction and coronary occlusion were accepted as being work related, certainly the femoral occlusion being the same process should also be included under the same status as being accelerated by job stress."

By decision dated February 26, 1986 and finalized March 10, 1986 the hearing representative affirmed the prior decision of the Office, finding that Dr. Shugoll's medical opinion constituted the weight of the medical evidence because at the time he rendered his opinion he had all the medical evidence and the entire case file in front of him for study and had a statement of accepted facts from which to work when he gave his opinion. The hearing representative also noted that Dr. Shugoll, based on a complete knowledge of the factual and medical evidence in the case, provided medical rationale that appellant's femoral artery occlusion was not caused by employment stress since it was not known whether stress causes or accelerates the underlying disease process of arteriosclerosis. The hearing representative further noted that a decision on causal relation must be based on individual medical reports in each instance of injury; he noted that acceptance of appellant's claim for a myocardial infarction was based on the medical report of Dr. Levenson and the rejection of appellant's claim for femoral artery occlusion was based on the report of Dr. Shugoll.

The Board finds that appellant's cardiovascular condition on and after October 15, 1984 was not causally related to his April 1981 accepted myocardial infarction or to factors of his federal employment.

The Board notes that the Federal (FECA) Procedure Manual chapter 1-100(5)(a)(1) states that "Federal Program cases . . . may not be serviced except in the National Office" and includes Department of Labor employees. In practice, the effect of this requirement is that all case actions, including initiation of medical referrals, are performed by the staff of the Branch of Special Claims, which is part of the National Office.

The Board notes that with regard to resolution of conflicts in medical opinion evidence, where the resolution of a conflict requires a physical examination by a referee physician, the usual practice is for the claims examiner to refer appellant to an appropriate Board-certified specialist in appellant's geographic area. However, if, in the judgment of the claims examiner in an individual case, a physical examination of appellant by the referee physician is not necessary, the practice of the Branch of Special Claims is to refer the case record to an appropriate specialist in the Washington, D.C. metropolitan area. The rationale for this practice is administrative convenience: the smaller the geographical distance involved, the more efficient the Office can be in monitoring the progress of the referral.

In the present case the claims examiner concluded that resolution of the conflict in medical opinion evidence did not require the physical referral of appellant to the referee specialist. Since the question to be resolved was whether appellant's left superficial femoral artery occlusion, which had been surgically treated in October 1984 by the implacement of a bypass graft, and from which he had recovered, was causally related to his 1981 myocardial infarction or to factors of his employment, the Board finds that the claims examiner properly concluded that evaluation by the selected medical referee, Dr. Shugoll, of the contents of the medical and case record, including the statement of accepted facts, would be sufficient to resolve the conflict. The Board notes that it stated in *Melvina Jackson*,[1] that "where the diagnosis is clearly established and the issue is whether factors of employment caused or aggravated the diagnosed condition, a physical examination would add little probative value to a medical opinion on causal relation. On the other hand, a medical opinion on the extent of an employee's range of joint motion for schedule award purposes would have no probative value if not based on a physical examination."[2]

The Board finds in this case that the issue of causal relationship is not one that requires physical examination of appellant and further finds that such a physical examination of appellant almost one year after the surgical treatment of his condition from which he had recovered, would add nothing to the completeness or the accuracy of Dr. Shugoll's analysis of causal relation of appellant's condition with factors of his federal employment.

The Board finds that the referral of appellant's case record to Dr. Shugoll for resolution of the conflict in medical opinion evidence is consistent with established procedures for servicing cases involving Department of Labor employees and with established procedures for conducting referee medical examinations. In his August 23, 1985 report, Dr. Shugoll analyzed the medical evidence and explained his reasoning in finding no causal relationship between appellant's myocardial infarction in 1981 and the subsequent femoral artery occlusion in 1984. Because Dr. Shugoll was the impartial specialist selected to resolve a conflict in medical opinion evidence, his well-rationalized report based on the entire case record is entitled to special weight and constitutes the weight of the medical evidence.[3]

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[1] 38 ECAB 443 (1987).

[2] *Id.* at 451.

[3] *John Wilkes, Jr.*, 36 ECAB 451 (1985); *John R. Walker*, 36 ECAB 267 (1984); *James L. Hays*, 36 ECAB 128 (1984).

The March 10, 1986 decision of the Office of Workers' Compensation Programs is hereby affirmed.

In the Matter of MADGE H. GURR *and* DEPARTMENT OF THE ARMY, TOOELE ARMY DEPOT, Tooele, Utah

Docket No. 88-748; Submitted on the Record;
Issued July 29, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that there was an overpayment of compensation to appellant in the amount of $2,486.79, for the period May 29, 1986 through November 21, 1987; (2) whether the Office properly determined that appellant was not "without fault" in the creation of the overpayment, and that therefore the overpayment was not subject to waiver; and (3) whether the Office properly required repayment from appellant's continuing compensation at the rate of $274.00 per month.

On November 6, 1970 appellant, then a 47-year-old forklift operator, filed a claim alleging injury to her lower back on October 27, 1970 when she raised the tongue of a trailer to connect it with the forklift and felt low back pain. Appellant did not stop work; the Office of Workers' Compensation Programs paid related medical expenses.

On January 26, 1976 appellant, then a 52-year-old mechanic's helper, filed a claim alleging injury to her lower back on October 21, 1975 when her hand slipped on wet metal as she was leaning down to get a serial number from a vehicle, and she twisted her back as she tried to catch herself. She was diagnosed by Dr. Albert F. Martin, a Board-certified orthopedic surgeon, as having sustained a herniated lumbar disc; appellant stopped work on October 23, 1975 and did not return. On March 24, 1976 the Office accepted appellant's claim for a herniated lumbar disc and noted that a concurrent disability was phlebitis of the right lower extremity.

By CA-1049 dated April 6, 1976 appellant was advised that she would receive compensation every four weeks and that the included requirements could affect her rights to continued compensation.

Dr. Martin performed a lumbar discectomy on appellant on March 11, 1976 and thereafter continued to follow her recovery throughout 1976.

By CA-1032 dated December 13, 1976 appellant noted that she had no employment during the preceding period and indicated that her husband was a dependent residing within her household.

By letter dated December 16, 1976 the Office returned appellant's CA-1032 and requested clarification of whether she and her husband were living together, were separated, or were divorcing or divorced. On December 27, 1976 the Office received an annotated copy of appellant's original CA-1032 on which she had noted that she and her husband were living together but that he was not a dependent.

By letter dated February 28, 1977 appellant advised the Office that disability retirement had been approved for her but that she elected to continue to receive compensation in lieu of her retirement annuity.

Dr. Martin continued to regularly evalute appellant during 1977 and provide the Office with reports on her disability.

By report dated October 11, 1977 the Office advised the Civil Service Commission that appellant was receiving compensation at a ¾ rate of her prior wage.

By CA-1032 dated October 26, 1977 appellant indicated that she had not worked during the period since her last report and indicated that she had no dependents. No mention of her husband was made, and no date on which dependency ceased was given.

Dr. Martin continued to follow appellant for her back condition throughout 1978 and to provide periodic reports on her disability.

By CA-1032 dated October 24, 1978 appellant indicated that she had not worked since the last report and noted no dependents and no date on which dependency ceased.

By CA-1032 dated April 30, 1979 appellant indicated that she had not worked since the last report and indicated no dependents or date on which dependency ceased.

Dr. Martin continued to follow appellant throughout 1979 for her lower back condition, and he continued to provide periodic reports to the Office on her disability.

In a memorandum dated August 23, 1979 about appellant's request to change her health benefits plan, the Office noted that appellant's husband was also on the automatic roll for receipt of Federal Employees' Compensation Act benefits.

By CA-1032 dated October 22, 1979 appellant indicated that she had not worked since the last report and noted no dependents and no date on which dependency ceased.

By letter dated January 24, 1980 the Office advised appellant that she was receiving compensation at an augmented rate on account of an eligible dependent, her husband. The Office explained that for compensation purposes it was not necessary that her husband actually be financially dependent on her but that it was necessary only for her husband to be legally married to her and residing as a member of her household. The Office noted that for some time appellant had been returning to the Office periodic inquiry forms indicating that she had no dependents, and it requested that if she was presently married, that she give her husband's name and the date of her marriage, and state whether her husband was a member of her household, and if she was not presently married, that she give the date on which such dependency ceased and the reason. Appellant replied by letter dated January 28, 1980 that she was legally married to her husband and had been since 1954, and that they presently shared the same household.

By CA-1032 dated November 5, 1980 appellant indicated that she had not worked since the last report and indicated her husband as a dependent residing within her household.

Through 1980 and 1981 Dr. Martin continued to treat appellant for her lower back condition and continued to provide progress reports on her condition to the Office.

By CA-1032 dated December 17, 1981 appellant indicated that she had not worked since the last report and indicated that her husband was still a member of her household.

Appellant continued to be treated on a regular basis by Dr. Martin throughout 1982 and 1983; written reports evaluating her continuing disability were provided to the Office.

By CA-1032 dated December 13, 1983 appellant noted that she had not worked since the last report and indicated that her husband was still a member of her household.

Dr. Martin continued to follow appellant during 1984, provide reports on her condition, and opine that she remained unable to bend, squat, or ride for an hour to and from work.

By CA-1032 completed on December 27, 1984 appellant noted that she was receiving no other federal benefits besides her compensation; Part B of the form noted as follows: "The basic rate of compensation is 66⅔ percent of the applicable pay rate if there are no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if there are one or more eligible dependents." Appellant noted that her husband qualified as a dependent.

Further medical reports and a work evaluation were provided by Dr. Martin in 1985.

By CA-1032 completed on February 4, 1986 appellant indicated that she continued to receive only federal compensation benefits as income, that she had not worked in the period since the last report, and that her husband still resided with her and qualified as a dependent. Appellant further listed her 15-year-old grandson as qualifying as a second dependent under Part B of the form.

Dr. Martin continued to provide treatment to appellant during 1986, and he continued to provide the Office with his opinion on her continuing disability for full time employment.

In a CA-1032 form completed on November 10, 1986 appellant noted that she had not worked since the last report and indicated that she now had no dependents because her husband had died on May 28, 1986. Appellant also noted that since June of 1986 she had been receiving a $363.00 per month survivor's annuity from the Office of Personnel Management due to her husband's death, in addition to her own federal compensation benefits. No other benefits were indicated as being received.

Appellant continued to be seen by Dr. Martin for treatment of her low back condition; he continued to provide reports to the Office on the nature and extent of her continuing disability.

By CA-1032 completed on October 2, 1987 appellant noted that she had not worked since the last report and she indicated that she was receiving a $367.00 per month widow's annuity due to the death of her husband in addition to her own federal compensation benefits; appellant claimed no additional dependents.

By periodic roll payment worksheet dated December 4, 1987 and an accompanying memorandum to the file, an Office claims examiner noted that appellant's husband had died on May 28, 1986 but that she had not informed the Office of that fact until her completion of the November 10, 1986 CA-1032; the examiner found that appellant was at fault in the creation of an overpayment of compensation for failure to provide notice to the Office of her husband's death for a "a period of nine months," and because of that omission she was paid compensation at the 75 percent rate instead of at the 66⅔ percent rate until November 22, 1987. The claims examiner also noted that appellant should have known that she was not entitled to the higher rate after the death of her spouse.

By letter dated December 11, 1987 the Office made a preliminary determination that an overpayment of compensation in the amount of $2,486.79 had occurred and that appellant was not without fault in its creation. The Office noted that appellant's spouse had died on May 28, 1986 but that appellant had received compensation at the augmented rate until November 22, 1987; it found that appellant failed to notify the Office in a timely manner of the death of her spouse and that she knew or should have known that she was not entitled to the rate of compensation she was receiving after the death of her spouse.

By memorandum to the file dated January 11, 1988 the Office claims examiner noted that appellant had failed to respond to the December 11, 1987 Office letter, recommended that the December 11, 1987 preliminary determination be made final, and recommended that the overpayment be recovered by withholding 25 percent from appellant's gross amount of compensation, which amounted to $274.00 per month.

By letter decision dated January 13, 1988 the Office finalized its December 11, 1987 decision finding appellant at fault in the creation of the overpayment for the period May 29, 1986 through November 21, 1987 for failing to timely notify the Office of her husband's death and because she should have known that she was not entitled to the same rate of compensation after the death of her spouse, and it ordered $274.00 per month withheld from appellant's continuing compensation payments.

The Board finds that the evidence establishes that there was an overpayment of compensation in the amount of $2,486.79 for the period May 29, 1986 through November 21, 1987.

The Board notes that the basic rate of compensation under the Federal Employees' Compensation Act is 66⅔ percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, he or she is entitled to have his or her basic compensation augmented at the rate of 8⅓ percent of his or her monthly pay for a total compensation rate of 75 percent of the employee's montly pay.[1] A husband is considered to be an employee's dependent under the Act if (a) he is a member of the same household as the employee; or (b) he is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute to his support.[2] In the present case the Office correctly determined that appellant's husband qualified as an eligible dependent for compensation purposes, and that appellant was entitled to receive compensation at an augmented rate while her husband remained legally married to her and resided as a member of her household.

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[1] 5 U.S.C. section 8110(b).

[2] 5 U.S.C. section 8110(a)(2).

The Board further finds that upon the death of her husband, appellant no longer had any eligible dependent residing in her household, and was therefore no longer entitled to receive compensation at an augmented rate.[3] Because appellant continued to receive compensation at the augmented rate from May 28, 1986, the date of her husband's death, through November 21, 1987, the date on which the Office finally terminated appellant's augmented compensation, the Board finds that an overpayment in the amount of $2,486.79 occurred.

The Board additionally finds that the Office properly determined that appellant was not "without fault" in the creation of the overpayment for the period of May 29, 1986 through November 21, 1987 and that therefore the overpayment is not subject to waiver.

Section 8129 of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," the overpayment "shall" be recovered unless the "incorrect payment has been made to an individal who is without fault and when adjustment or recovery would defeat the purpose of th[e] subchapter or would be against equity and good conscience." [4]

In deciding whether an individal is "without fault," what constitutes "fault" is determined by Section 10.320 of Title 20 of the Code of Federal Regulations which was promulgated pursuant to the Act.[5]

Section 10.320 states in pertinent part:

> "(a) . . . Although the Office may have been at fault in making the overpayment that fact does not relieve the overpaid individual . . . from liability for repayment if such individual is not without fault.
>
> "(b) 'With fault.' In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who: (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) Failed to furnish information which the individual knew or should have known to be material; or (3) . . .

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[3] *See Diane K. McColl*, 37 ECAB 574 (1986).

[4] 5 U.S.C. section 8129(a), (b).

[5] 20 C.F.R. section 10.320 (revised April 1, 1987).

> [A]ccepted a payment which the individual knew or should have been expected to know was incorrect."[6]

The Board finds that the Office properly determined that appellant was not without fault in the creation of the overpayment on the second and third bases above: appellant did not promptly notify the Office, with respect to her claim and receipt of compensation, of the change in status of her dependent after his May 28, 1986 death, but instead waited until another CA-1032 report was due in November 1986 and only then mentioned that her husband had ceased to be a dependent as of May 28, 1986. The Board notes that such notice almost six months after the fact constitutes failure to promptly furnish material information as defined in Section 10.320(b)(2).

Additionally, the Board notes that appellant was explicitly advised by Office letter dated January 24, 1980 that she was receiving compensation at an augmented rate on account of an eligible dependent, her husband. In that letter the Office noted that appellant had been incorrectly completing the CA-1032 reports omitting mention of her husband as a dependent, and it explained that he qualified as a dependent under the provisions of the Act. Appellant demonstrated an understanding of that fact in the subsequently completed CA-1032s from November 5, 1980 annually through February 4, 1986. Additionally, the Board notes that under Part B of the February 4, 1986 CA-1032 regarding dependents the following statement appeared: "The basic rate of compensation is 66⅔ percent of the applicable pay rate if there are no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if there are one or more eligible dependents. You must therefore answer the questions below to ensure that your compensation is paid at the correct rate." Because appellant answered the questions that appeared below indicating that her husband was still a dependent and completed the form on February 4, 1986, slightly over three months before her husband died, the Board finds that appellant knew or should have been aware that she was still receiving compensation at an augmented rate at the time of her husband's death; because she continued to accept compensation payments at the augmented rate after her husband's death until November 1987, even though she advised the Office on the next CA-1032 periodic report provided in November 1986 that her husband had died in May of 1986, the Board finds that appellant was at fault in the creation of the overpayment of compensation in the amount of $2,486.79.

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[6] *Id.* at section 10.320(b).

The Board finds, therefore, that waiver of recovery is not possible. However, the Board finds that the Office improperly determined the amount of withholding from appellant's future benefits necessary to repay the ovepayment. The Board notes that the Office failed to consider Title 20 C.F.R. section 10.321(a) in its December 4, 1987 memorandum to the file, its December 11, 1987 preliminary determination, and its January 13, 1988 decision.[7] This section states in pertinent part: "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."

The Board finds that the Office did not consider the extent of appellant's financial expenses and obligations and the effect of such a withholding upon those obligations.

The Board, therefore, finds that the case must be remanded to the Office for reevaluation of the amount of withholding from appellant's continuing benefits with due consideration of the provisions of 20 C.F.R. section 10.321 *et seq.*, to be followed by a *de novo* decision on that issue.

The decision of the Office of Workers' Compensation dated January 13, 1988 is hereby affirmed in part as modified, and remanded in part for redetermination of withholding from appellant's continuing compensation in accordance with this decision.

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[7] *See* 20 C.F.R. section 10.321 *et seq.* (revised April 1, 1987).

In the Matter of EDWARD O. HAMILTON *and* U.S. POSTAL SERVICE, POST OFFICE, Rockville, Md.

Docket No. 87-1767; Hearing March 15, 1988;
Issued July 29, 1988

Appearances: *Robert G. Blackford, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, GEORGE E. RIVERS, MICHELE VON KELSCH

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation benefits for the period January 27, 1986 through June 20, 1986 because he knowingly failed to report earnings from self-employment; if so, (2) whether the Office properly found that appellant was not without fault in the creation of an overpayment of compensation in the amount of $2,502.56 and therefore the overpayment was not subject to waiver; and (3) whether the Board has jurisdiction to consider whether the Office properly required recovery of the overpayment by a salary offset of $62.00 per month.

On December 11, 1985 appellant, then a 37-year-old mail clerk, sustained an injury to his lower back while in the performance of duty. Appellant stopped work on the date of injury and was found totally disabled through December 25, 1986. Appellant returned to part-time duty for four hours a day commencing on December 26, 1985. He received continuation of pay through January 25, 1986 and on January 27, 1986 submitted a CA-7 claim form for continuing compensation benefits for four hours of work that he missed per day after his return to part-time duty through February 7, 1986. Appellant subsequently filed CA-8 claim forms for wage loss from February 8, 1986 through June 20, 1986. On each of the CA-8 claim forms appellant responded "N/A [not applicable]" to the request for information on work during the period for which compensation was claimed which addressed commissions and self-employment. The CA-8 forms noted that the claimant was to "show all activities, whether or not income resulted from your efforts." Appellant received compensation benefits totaling $2,502.56 for the periods claimed through May 9, 1986.

On May 21, 1986 the employing establishment submitted the results of an investigative memorandum conducted by a postal inspector which indicated that during the period compensation was being paid, appellant was engaged in self-employment as a photographer. The record indicates that a postal inspector, using an alias, contacted appellant and scheduled an appointment for a photography sitting. The memorandum indicates that appellant engaged in commercial photography and that he admitted earning money as a photographer while receiving continuation of pay and compensation benefits. According to the memorandum, appellant stated he did not report his outside earnings because he "thought income made after 4:00 p.m. and on Saturday and Sunday was not required on the form." Furthermore, appellant indicated that he took a loss on his tax return after deducting expenses from his gross income.

By compensation order dated July 1, 1986 the Office determined that appellant had forfeited his right to compensation for the period January 27, 1986 through June 20, 1986 due to his failure to report his self-employment as a photographer. In a letter decision dated July 2, 1986 the Office made a preliminary determination that appellant was at fault in the creation of an overpayment in the amount of $2,502.56 because he received earnings from self-employment during the period January 27, 1986 through June 20, 1986. By decision dated August 7, 1986 the Office finalized its preliminary determination and requested that appellant forward a check in the amount of the overpayment.

By letter dated August 20, 1986, appellant requested a hearing before an Office hearing representative. On December 29, 1986 appellant submitted an Office form OWCP-20 (Overpayment Recovery Questionnaire) in which he listed a monthly income of $795.00, consisting of salary in the amount of $550.00 and rent of $245.00. Monthly expenses were listed in the amount of $1,344.52. Appellant indicated that he was not at fault in the creation of the overpayment because photography was a hobby and he had no net profit resulting from such activities. Appellant also submitted copies of business records relating to his self-employment earnings and expenses during the period of forfeiture.

Following a hearing on February 26, 1987, the Office hearing representative issued a decision on May 14, 1987, finalized May 15, 1987, which affirmed the Office's determination that appellant had forfeited his right to compensation benefits for the period January 27, 1986 through June 20, 1986; that appellant was at fault in the creation of the overpayment in the amount of $2.502.56; and it was directed that the overpayment be collected from appellant's federal salary at the rate of $62.00 every four weeks.

With respect to the first issue, the Board finds that appellant has forfeited his right to compensation benefits for the period February 8, 1986 through June 20, 1986 under section 8106(b) of the Federal Employees' Compensation Act.[1]

Section 8106(b) of the Act provides in pertinent part:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the time

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[1] *See* 5 U.S.C. section 8101 *et seq.*

> the Secretary specifies. * * * An employee who—(1) fails to make an affidavit or report when required; or (2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."[2]

Appellant's claim was accepted by the Office, and he received continuation of pay from December 11, 1985 through January 25, 1986. On January 27, 1986 appellant submitted an Office form CA-7 (Claim for Compensation) for continuing compensation benefits for the four hours of work he missed per day after his return to part-time duty through February 7, 1986. Appellant subsequently submitted Office form CA-8 (Claim for Continuing Compensation on Account of Disability) for wage loss for the period February 8, 1986 through June 26, 1986. The CA-8 claim forms submitted by appellant specifically requested information from appellant regarding any earnings from employment or self-employment and noted that appellant was to "show all activities, whether or not income resulted from his efforts."[3]

The Board finds that appellant forfeited his right to compensation benefits for the period February 8, 1986 through June 20, 1986 under Section 8106(b)(2) because he knowingly omitted or understated his earnings from self-employment as a photographer. The CA-8 forms submitted by appellant were completed as "N/A [not applicable]" to the form request for information on work for the period for which compensation was claimed. The case record establishes that appellant received compensation benefits totalling $2,502.56 for the period January 27, 1986 through June 20, 1986.

The Board finds, however, that appellant did not forfeit his compensation benefits for the period January 27, 1986 through February 7, 1986.

With regard to this period, the Board notes that appellant submitted an Office form CA-7 claiming compensation benefits for four hours of wage loss after his continuation of pay ceased on January 25, 1986. In the present case, the Office applied the forfeiture provisions of the Act to this period and, on appeal, counsel for the Director contends that appellant has forfeited his right to compensation for the period January 27, 1986 through February 7, 1986 under *Lorand A. Hegedus,*[4] as appellant failed to report his self-employment earnings to the Office even though the Office did not specifically request a report covering the period January 27, 1986 through February 7, 1986.

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[2] 5 U.S.C. section 8106(b).

[3] 20 C.F.R. section 10.110, Affidavit of report by the employee of employment and earnings, provides in pertinent part: "Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions whatsoever have been taken out of such wages, and include the value of subsistence, quarters, or other advantages received in kind as part of the wage or remuneration. In general, earnings from self-employment means the rate of pay the employee estimates it would cost him or her to have someone else perform the work the employee is performing."

In the *Hegedus* decision, the Board found that the Office was not limited to finding that an employee had forfeited his right to compensation solely for the period February 15, 1979 through February 15, 1980 covered by an Office CA-1032 form in which the employee failed to report his employment as a part-time chauffeur. The Board noted that the employee had been self-employed as a chauffeur during the period January 1, 1977 through December 31, 1979 and was subject to the forfeiture provisions of the Act for his failure to make a report to the Office as to his earnings. The basis for the Board's ruling in extending the forfeiture provision to an earlier period for which the Office did not send appellant a form CA-1032 was based on the fact that the Office, on June 22, 1972, had already advised appellant of his responsibility to report his employment, including periods of self-employment, to the Office at the time he was notified that he would be receiving compensation for temporary total disability. Further, the Office sent a follow-up notification to appellant on February 27, 1974 which again advised appellant of his responsibility to report his employment to the Office.

The facts of the present case are distinguishable from *Hegedus* because appellant did not receive any notification of his responsibility to report his employment activities or earning to the Office until he completed a form CA-8 on February 10, 1986 for the period commencing February 8, 1986. The CA-7 claim form submitted by appellant did not provide him with any notice of his responsibility to report his employment activities or earnings to the Office. The standard under which forfeiture is determined, section 8106(b), provides that an employee who "fails to make an affidavit or report when required" or "knowingly omits or understates any part of his earnings" forfeits his right to compensation "*to any period for which the affidavit or report was required.*" (Emphasis added). This section presumes that a claimant has been put on notification that he is to report on earnings or self-employment and either fails to make such a report when required or knowingly omits or understates any part of his earnings. For this reason, the Office improperly determined that appellant forfeited his right to compensation for the period January 27, 1986 through February 7, 1986.

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[4] 37 ECAB 162 (1985).

The Board finds that based on appellant's forfeiture of compensation for the period February 8, 1986 through June 20, 1986, he is with fault in the creation of an overpayment for that period.

Section 8129 of the Act provides in pertinent part:

> "(a) When an overpayment has been made to an individual under this subchapter because of an error of fact of law, adjustment shall be made under regulations prescribed by the Secretary of Labor decreasing later payments to which the individual is entitled."

* * *

> "(b) Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." [5]

Section 8129 necessitates a determination as to whether appellant is with fault in the creation of the overpayment of compensation for the period February 8, 1987 through June 20, 1986. In determining fault, the following factors are considered to determine whether the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [6]

In the present case, it is apparent that appellant is at fault in the creation of the overpayment of compensation under the second standard as set forth above.

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[5] 5 U.S.C. section 8129.

[6] Pursuant to *Califano v. Yamasaki*, 422 U. S. 682, 99 S. Ct. 2545, the Office established a procedure to be followed in handling overpayment of compensation cases. The procedures are detailed in the Federal Employees' Compensation Act (FECA) Procedure Manual, chapter 2-901(4)(a), Overpayments, Part 2—Claims.

In the present case, appellant engaged in commercial photography activities during the period February 8, 1986 through June 20, 1986 which generated earnings. When appellant filed the CA-8 report forms for continuing compensation, he represented to the Office that he had no earnings and did not otherwise notify the Office as to his activities although the CA-8 form required him to report "all activities, whether or not income resulted." Appellant's argument that he had no net earnings and therefore had nothing to report to the Office because his expenses exceeded the amount of his income has not been accepted by the Board as a reasonable justification for the failure to report employment activities or earnings to the Office as required.[7] In light of appellant's failure to furnish information which appellant should have known to be material to the Office, he is not without fault in the creation of the overpayment of compensation under section 8129, and the overpayment is not eligible for waiver.

With respect to the third issue, the Board finds that it does not have jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act because this involves offset of the salary of the federal employee as opposed to recovery made against continuing compensation benefits.

The Debt Collection Act of 1982 provides that debts owed to a federal agency may be collected by periodic offsets against the salary of a debtor who is employed by another federal agency.[8] The Department of Labor's regulations covering salary offsets were published in the Federal Register on February 5, 1987 and became effective March 8, 1987.[9] Under the procedures established, collection techniques were developed for deducting from the current pay account of a federal employee a "salary offset" when the employee owes money to the United States.[10] The Board notes that decisions made by the Office under the Debt Collection Act are reviewable by the Office of the Administrative Law Judge under 29 U.S.C. Part 18. The Board does not have jurisdiction to review the discretionary authority of the Office with respect to the method of recovery provided under the Debt Collection Act.

The Board therefore finds that appellant forfeited his right to compensation for the period February 8, 1986 through June 20, 1986 based on the fact that he knowingly omitted to report earnings from employment as required on form CA-8; appellant was at fault in the creation of the overpayment based on his failure to furnish information to the Office which he knew or should have known to be material and therefore the overpayment cannot be waived; and the case is remanded to the Office to recalculate the amount of overpayment that was created for the period February 8, 1986 through June 20, 1986. With regard to the method of recovery of the overpayment, the Board does not have jurisdiction over the issue because the Board's jurisdiction is limited to appeals from final decisions of the Office arising under the Federal Employees' Compensation Act.[11]

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[7] *See supra* note 3. *See also Howard M. Sprayberry*, 36 ECAB 115 (1984).

[8] Debt Collection Act, 5 U.S.C. section 5511 *et seq.*, Pub. L. 97-365.

[9] 52 Fed. Reg. 3,772 (February 5, 1987) (to be published at 29 C.F.R Part 20).

[10] *See* FECA Bulletin No. 87-35 (issued April 24, 1987).

The May 14, 1987 decision of the Office of Workers' Compensation Programs is modified to reflect that appellant forfeited his right to compensation for the period February 8, 1986 through June 20, 1986 and that an overpayment of compensation resulted from such forfeiture; the case is affirmed as modified and remanded to the Office for recalculation of the amount of overpayment for the period of forfeiture.

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[11] *See* 20 C.F.R. section 501.2(c).

In the Matter of JOHN OLEJARSKI *and* DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 88-823; Submitted on the Record;
Issued July 29, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs, in finding that appellant had a loss of wage-earning capacity, used the correct rate of pay in determining appellant's compensation benefits.

On November 14, 1980 appellant, then a 32-year-old apprentice welder, filed a claim for traumatic injury to his back and left leg sustained on that date, when he fell from a ladder in his federal employment. Appellant's claim was accepted by the Office on March 24, 1981 for a herniated nucleus pulposus L5-S1, left. Appellant returned to work on April 13, 1981.

By letter decision dated March 28, 1985 the Office terminated appellant's compensation beyond December 2, 1982 finding that the weight of the medical evidence established that appellant's condition beyond that date was not related to his November 14, 1980 employment injury. By decision and order dated January 14, 1987 the Office vacated its March 28, 1985 decision, which denied appellant's compensation claim beyond December 2, 1982, finding that appellant had sustained an aggravation of his preexisting back condition causally related to his employment injury. The Office accepted appellant's claim for aggravation of a preexisting back condition and second laminectomy L5–S1.

On February 28, 1987 appellant submitted a form CA–7 claim for compensation on account of traumatic injury. Appellant claimed a loss of wage-earning capacity based on sections 8106 and 8113 of the Federal Employees' Compensation Act.[1] The Office requested that both appellant and the employing establishment submit information to support the claim of permanent partial disability and loss of wage-earning capacity. The employing establishment responded, stating that appellant's pay rate was $10.81 per hour, reflecting a WG–8 grade level four position. Appellant responded, submitting a schedule showing the wage grades he would have reached from the date of injury through October 1985 but for his employment injury. Appellant also submitted a supplemental statement detailing his level of welding expertise and listing his welding certificates. Upon repeated request for comment on the information submitted by appellant, the employing establishment did not respond.

Medical evidence received from Dr. Daniel Gross, a Board-certified orthopedic specialist, on December 15, 1986, which is the latest in the file, supported partial disability and permanent light duty but stated that appellant could work eight hours a day with restrictions.

By letter decision dated December 2, 1987 the Office denied appellant's claim for compensation for permanent partial disability based on loss of wage-earning capacity because appellant did not show that he lost any wage-earning capacity due to the work injury. The Office indicated that the highest pay rate to which appellant was entitled, due to his employment injury, was that of a journeyman welder (his position upon graduation), which was $9.13 per hour as of August 8, 1981, the date of graduation, and which was currently $11.01 per hour. Since appellant's current pay rate at the WG–8 step 4 level (the level of his present position) is $11.13 per hour and the WG–8, step 4 pay rate has been consistently higher than the WG–10, step 2 rate (rate of a journeyman welder), since August 1, 1981, the Office found that appellant had not sustained any loss of wage-earning capacity due to his employment injury.

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[1] 5 U.S.C. sections 8106 and 8113.

On appeal appellant contends that 5 U.S.C. section 8113 provides that his wage-earning capacity should be computed based on his probable increased wage-earning capacity, but for the work injury, and that appellant's probable wage-earning capacity was that of a welder instructor WG–12, step 2 whose pay rate is $12.72 per hour. Appellant argued that his work history, level of aptitude, achievement and ambition demonstrated that he would have realized the position of welder instructor as of October 1985.

The Board finds that the Office of Workers' Compensation Programs used the correct rate of pay in determining appellant's compensation benefits.

Section 8113(a) of the Federal Employees' Compensation Act [2] provides:

> "If an individual (1) was a minor or employed in a learner's capacity at the time of injury; and (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity."

In interpreting this section of the Act the Board has held that "the Act contemplates but one increase in wage-earning capacity upon the learner's completion of training or the minor's reaching the age of majority; but it does not contemplate such factors as future promotions, increases in salary, or advancements, as these rest upon a number of indefinite and uncertain contingencies which place the happening of an event in the realm of possibility, not probability." [3]

In later cases the Board continued to interpret section 8113 of the Act as providing that an appellant is only entitled to compensation at the pay rate he would have received when he would have completed his training.[4] To reflect this interpretation of the Act the Office issued FECA Program Memorandum No. 122 (issued May 19, 1970) which stated:

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[2] 5 U.S.C. section 8113(a).

[3] *Robert H. Merritt*, 11 ECAB 64 (1959).

> "In effect, the compensation rate of a learner should be adjusted if the pay rate increased as a result of a change in his learner's status which would have brought him either (1) to a new level within or (2) to completion of his learner's program."

In the present case, appellant was injured at work while in the position of an apprentice welder. Upon graduation appellant would have advanced to the position of journeyman welder which currently has a pay rate of $11.01 per hour. The Office correctly found that appellant's wage-earning capacity under the Act was that of the position of journeyman welder. Appellant argued on appeal that his probable wage-earning capacity was that of the position of the welder supervisor, which he would have attained by numerous promotions on the job based on his skill, experience, aptitude and history of work performance. However, the Board has long held that the possibility of future promotions or greater earnings, but for the employment injury, does not support a loss of wage-earning capacity.[5] Accordingly, the Office properly found that appellant's wage-earning capacity was that of a journeyman welder, the position appellant would have held upon graduation. Since appellant's current pay rate at the employing establishment is greater than the current pay rate of a journeyman welder, the Office correctly held that appellant has not sustained any loss of wage-earning capacity.

The December 2, 1987 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[4] *See Lawrence A. Garner*, Docket No. 81-1519 (issued March 26, 1982); *Bruce E. Hickey*, 19 ECAB 98 (1967).

[5] *See Bobbie P. Beck*, 33 ECAB 146 (1981); *Judith Henderson*, 32 ECAB 501 (1981); *Daniel T. Morisky*, 30 ECAB 350 (1979).

In the Matter of HARRY S. RENKERT *and* U.S. POSTAL SERVICE, POST OFFICE, Miami, Fla.

Docket No. 87-1882; Submitted on the Record;
Issued July 29, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined under 5 U.S.C. section 8106(b) that appellant forfeited his right to compensation for the period February 13, 1981 through September 24, 1982; and (2) whether appellant was not "without fault" in the creation of a $12,662.00 overpayment of compensation.

On August 12, 1975 appellant, then a 43-year-old letter carrier, was assaulted while delivering mail. Appellant worked on light duty until September 25, 1975 when he stopped working. He returned to work on November 11, 1975 and received continuation of pay for the period he did not work. He stopped again on February 23, 1976. He did not return thereafter.

Appellant's physician, Dr. Hubert H. Aronson, diagnosed a herniated C6-C7 disc. Appellant underwent surgery on March 9, 1976 for an anterior discectomy and interbody fusion of the C6-C7 disc.

The Office of Workers' Compensation Programs accepted appellant's claim for cervical and lumbar strain and a herniated C6-C7 disc. The Office began payment of temporary total disability compensation effective February 24, 1976.

In an April 19, 1976 letter, the Office informed appellant that he would begin receiving compensation payments automatically every four weeks. The Office informed appellant that if he returned to his former job or obtained other employment, he was to report his return to work immediately to the Office. The Office indicated that if he was self-employed he was to report as pay what it would have cost to hire someone else to do the same work. The Office instructed appellant to return any compensation checks he received after he returned to work.

On February 7, 1978 the Office sent appellant a CA-1032 Form. The Office instructed appellant to report on the form all employment he held for the prior 12 months and the pay he received for the employment. The Office stated that if he was self-employed he was required to report as pay what it would have cost to hire someone to do the same work. In a February 16, 1978 response, appellant reported that he had no employment for the period in question. Appellant submitted subsequent CA-1032 forms on April 12, 1979, February 12, 1981, January 25, 1982, and September 24, 1982. On all those forms, appellant either reported that he had no employment for the period covered by the CA-1032 form or did not complete the space for reporting employment.

In a February 11, 1981 decision, the Office found that appellant could perform the duties of a collection clerk and therefore had a 53 percent loss of wage-earning capacity, effective February 26, 1981. The Office's decision was upheld by an Office hearing representative in a September 18, 1981 decision. In a December 31, 1981 order, the Board set aside the September 18, 1981 and February 11, 1981 decisions on the ground that the record was not fully developed when the Office medical adviser described appellant's work restrictions. The case was remanded for referral of appellant to an appropriate specialist for a description of appellant's work restrictions.[1]

In a February 10, 1983 memorandum, an official at the employing establishment indicated that an investigation by postal inspectors showed that appellant was engaged in gainful employment as a fishing guide. He submitted a copy of a February 4, 1983 report from a postal investigator on the investigation. The postal inspector reported that one witness stated that appellant began fishing guide activities in June 1980. Another witness stated that he had fished with appellant as a paying customer since October 1981. The second witness indicated that appellant charged $165.00 for an entire day of fishing and $115.00 for a half-day of fishing. The inspector stated that on two occasions, on August 23, 1982 and December 15, 1982, postal inspectors had hired appellant as a fishing guide and had paid him on each occasion.

In a February 23, 1983 decision, the Office terminated appellant's compensation, effective the date of the decision, on the ground that appellant no longer had a loss of capacity to earn wages and disability for work due to his August 17, 1975 injury. The Office also found that appellant forfeited all compensation effective April 3, 1979 for knowingly omitting to report his earnings to the Office.

In a March 17, 1983 preliminary decision, the Office found that appellant had received an overpayment of $37,025.80 because he forfeited his right to compensation for the period April 3, 1979 to February 23, 1983 for failure to report earned income. The Office made a preliminary finding that appellant was at fault in the matter of the overpayment because he failed to furnish the Office with information which he knew or should have known to be material and because he made incorrect statements on Form CA-1032. The Office informed appellant that he had the right to submit evidence or arguments if he disagreed with the amount of the overpayment, disagreed with the finding that an overpayment occurred or believed that the overpayment occurred through no fault of his own. The Office also informed appellant of his right to a prerecoupment hearing.

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[1] Docket No. 82-119 (Order Remanding Case issued December 31, 1981).

In a March 15, 1983 letter appellant requested a hearing. In an October 31, 1983 decision, an Office hearing representative, without a hearing, vacated the Office's February 23, 1983 and March 17, 1983 decisions. He stated that although the Office had found that appellant had been gainfully employed subsequent to April 3, 1979, a large part of the information on which it based its decision constituted hearsay. He concluded that the evidence of record, other than the postal inspector's fishing trips, were not of a substantial and probative nature which would support the subsequent actions of the Office in declaring a forfeiture of compensation. The hearing representative also stated that the Office, in order to terminate compensation, had the burden of establishing that appellant's disability had ceased, lessened or was no longer related to appellant's employment. He indicated that this issue was properly addressed through medical evidence. He found that the observations of postal inspectors, upon which the Office based its termination of compensation, did not constitute probative medical opinion evidence. The hearing representative stated that the Office should request from appellant a description of all his employment, including wages earned. He indicated that the Office should then proceed to consider appellant's entitlement to benefits received prior to February 23, 1983. He directed the Office to refer appellant to an appropriate specialist for an examination, a diagnosis, his opinion on the relationship of the diagnosed condition to the employment injury and appellant's work limitations due to such an injury. He stated that the Office should then issue a *de novo* decision with respect to appellant's compensation entitlement subsequent to February 23, 1983.

In a January 4, 1984 letter, the Office requested that appellant submit a complete description of all his employment prior to and after August 12, 1975. In a February 29, 1984 letter, appellant responded that he was self-employed after mid-1981 as a fishing guide. He indicated that he earned $6,435.00 in 1981 and $16,695.00 in 1982. In a March 19, 1984 letter, appellant stated that the figure he gave for 1982 included income received by his wife. He reported that the actual gross income from his fishing guide business in 1982 was $14,000.00. In a letter received by the Office on April 23, 1984, appellant stated that he received no income for the period June 1980 through June 1981. He reported that for January and February 1983 he received $2,000.00 in income for the fishing charter business. He indicated that he was no longer working as a fishing guide but was engaged in the boat charter business.

In a February 24, 1986 decision, the Office found that appellant had received an overpayment of $16,800.72 in compensation because he forfeited his right to compensation for the period October 25, 1980 to September 24, 1982 by failing to report his earned income. The Office made a preliminary finding that appellant was at fault in the matter because he failed to furnish the Office with information which he knew or should have known to be material and because he made incorrect statements on Form CA-1032. The Office stated that the letter was not a final decision. It again informed appellant of his right to submit additional evidence and his right to a prerecoupment hearing. Appellant requested a hearing before an Office hearing representative.

In a March 5, 1986 letter, the Office stated that appellant was entitled to further compensation benefits after February 24, 1983. It indicated that the wage-earning capacity decision of February 11, 1981 appeared to need revision because the record showed improvement in appellant's physical limitations and his actual earnings reflected a greater earning capacity than the Office had previously determined. The Office requested that appellant advise it of his actual earnings since January 1, 1983.

At the February 10, 1987 hearing, appellant testified that in the middle of 1981, after his compensation was reduced, he discussed the matter of his compensation with a union official. Appellant stated that the union official advised him that he could earn up to 80 percent of his salary at the employing establishment. Appellant testified that he was under the impression that the money he earned by working as a fishing guide was not earned if he did not earn as much as he had been paid when he was working at the employing establishment. He indicated that for this reason he did not report his earnings from self-employment on the CA-1032 forms. He stated that he did not earn any money prior to February 1981, when he completed a CA-1032 Form.

After the hearing, appellant submitted a March 5, 1987 overpayment recovery questionnaire. He indicated that he and his wife had a total monthly income of $1,750.00, total monthly expenses of

$1,072.25 and assets of $8,900.00. He again stated that he was not at fault because he did not know that he had to report any amount he earned under 80 percent of the pay he received from the employing establishment.

In a June 1, 1987 decision, the Office hearing representative found that as it was not established that appellant was employed as a fishing guide until mid-1981, the period of forfeiture in appellant's case was from February 13, 1981 through September 24, 1982. He further found that the amount of compensation paid during that period was $12,662.00. The hearing representative concluded that since appellant failed to report his earnings as required, he was not without fault with respect to the overpayment. He stated that the Office should begin recovering the overpayment by requesting a 50 percent offset of appellant's net monthly retirement annuity. He also stated that the Office should further develop the case to recalculate appellant's compensation for the period September 25, 1982 through February 23, 1983 and to determine appellant's compensation for the period after February 23, 1983, basing both calculations on appellant's actual earnings during the periods in question.

The Board finds that the Office properly determined that appellant forfeited his right to compensation for the period February 13, 1981 through September 24, 1982.

Section 8106(b) of the Federal Employees' Compensation Act,[2] in pertinent part, states as follows:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. * * * An employee who—'(1) fails to make an affidavit or report when required'; or '(2) knowingly omits or understates any part of his earning; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.' "

Appellant stated that he was under the impression that any money he earned as a fishing guide did not have to be reported if he did not earn as much as he had paid when he was working at the employing establishment. The Office, however, in its April 19, 1976 letter, informed appellant that if he returned to his former job or obtained other employment he was to report his return to work immediately. The Office specifically stated to appellant that if he was self-employed, he was to report the cost of hiring someone else to perform his duties. The Office repeated this statement in the CA-1032 forms it sent to appellant. None of these letters contained any threshold or level below which appellant did not have to report his earnings from self-employment. Appellant therefore should have been aware that he had to report any and all earnings from self-employment, no matter how small the amount. In the CA-1032 forms dated January 25, 1982 and September 24, 1982 appellant indicated that he did not have any earnings, yet he subsequently admitted that he was working as a fishing guide beginning by July 1, 1981.

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[2] 5 U.S.C. section 8106(c).

Under these circumstances, the Office properly determined that appellant had knowingly failed to report earnings from employment and that pursuant to the provisions of section 8106(b), his failure resulted in forfeiture of his right to compensation for any period for which a report was required. In *Charles A. Griffin,*[3] the Board stated that if the employee "had *any* earnings from employment or self-employment during the period covered by the report, he would not be entitled to compensation for any portion of the period covered by the report." In this case appellant completed reports on February 12, 1981, January 25, 1982 and September 24, 1982. Appellant started working by July 1, 1981. Thus he was working during the period covered by the January 25, 1982 report which required that he report all earnings received after the last report, dated February 12, 1981. He continued to work beyond September 24, 1982. Appellant therefore must forfeit compensation for the entire periods covered by the January 25, 1982 and September 24, 1982 reports, February 13, 1981 through September 24, 1982.[4]

The Board further finds that appellant is not "without fault" with respect to the resulting overpayment and therefore the overpayment is not subject to waiver.

Section 8129(a) of the Act [5] provides that when an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of overpayment is possible if the claimant is not without fault in helping to create the overpayment.

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[3] 22 ECAB 94 (1970).

[4] *Robert L. Smith,* 39 ECAB 202 (1987).

[5] U.S.C. section 8129(a).

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show an incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."

In the present case it is apparent that the Office applied the first two standards—an incorrect statement made by the payee which the payee knew or should have known to be incorrect, and failure of the payee to furnish information which the payee knew or should have known to be material—in finding appellant at fault in creating the overpayment.

Appellant completed and returned CA-1032 forms on January 25, 1982 and September 24, 1982 stating that he had no employment and earnings during the period covered by the form. Since appellant was actually working at the time that he stated that he had no employment or earnings, he knew this statement was incorrect. Moreover, appellant was advised by the Office on February 7, 1978 that he must notify the Office when he returned to work or obtained other employment. He was specifically instructed in that letter and in subsequent CA-1032 forms on how to report his earnings from self-employment. Thus, appellant should have known that this information was material, yet he failed to furnish the information regarding his employment. Therefore, the Board finds that appellant was not without fault in creating the overpayment because he made an incorrect statement which he knew was incorrect and he failed to furnish requested information that he should have known to be material. He is therefore not entitled to consideration of waiver of recovery of the overpayment.

The decisions of the Office of Workers' Compensation Programs, dated February 24, 1986 and June 1, 1987, are hereby affirmed.

In the Matter of Thomas J. Scola *and* Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.

Docket No. 88-925; Submitted on the Record;
Issued July 29, 1988

Before Michael J. Walsh, George E. Rivers, David S. Gerson

The issue is whether appellant has met his burden of proof in establishing that he sustained a traumatic injury on December 30, 1985 following a disciplinary action meeting held on that date.

On January 2, 1986, appellant, a 40-year-old boiler plant operator, filed a traumatic injury claim alleging that on December 30, 1985, the date he stopped work, he experienced chest pains and became emotionally upset and nervous following a disciplinary action meeting with his supervisors at which he received a reprimand. Appellant also alleged on his claim form that the December 30, 1985 meeting constituted a "deliberate aggravation of his Veterans Administration service-connected disability." By letter dated June 19, 1985, the Office of Workers' Compensation Programs advised appellant that he had the burden of proof in establishing his claim and that to date the Office had not received any factual or medical evidence supportive of his claim. The Office described the type of factual and medical evidence appellant needed to submit to meet his burden of proof and informed appellant that it would hold the record open for an additional 30 days to allow him time to submit such evidence. The record indicates that appellant did not respond to this letter. By compensation order dated July 21, 1986, the Office denied appellant's claim for compensation on the basis that he failed to submit evidence supportive of his claim and, therefore, failed to discharge his burden of proof.

By letter dated January 1987, appellant requested reconsideration of the Office's July 21, 1986 decision and submitted the January 15, 1986 report of Dr. Donavon Albertson, a Board-certified internist, who examined appellant in the emergency room at Portsmouth Hospital on December 30, 1985 and in his report noted that

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appellant attributed his chest pains to a confrontation with management at his place of employment and that appellant further stated that "this has been occurring over the past few months." Dr. Albertson disclosed findings upon examination, reported that appellant's vital signs were normal and there was no "cardiac rub, murmur or gallop," diagnosed "chest wall syndrome of left pectoral muscle and adjustment disorder," and referred appellant to a psychiatrist for ongoing treatment but rendered no opinion on the cause of appellant's diagnosed conditions. Appellant also submitted the February 13, 1986 report of Dr. Frederick K. Poulin, Jr., a Board-certified cardiologist, who reviewed appellant's medical history, noting that he suffers from post-traumatic stress disorder and has been treated for hypertension, disclosed findings upon examination, reported that appellant's cardiac examination was unremarkable, his electrocardiogram was within normal limits and his chest x-ray showed a normal heart size, and concluded that appellant's chest pain was "most likely related to the chest wall, aggravated by situations of anxiety and is not a manifestation of underlying coronary disease."

Appellant also submitted the February 21, 1985 report of Dr. Brian Gottlieb, a staff psychiatrist with the Veterans Administration Hospital, who stated that appellant was hospitalized from January 27, 1986 to January 31, 1986 but did not disclose the reasons for hospitalization and advised that appellant would be entering a rehabilitation program for Vietnam veterans. Appellant also submitted the May 30, 1986 combined report of Dr. Andrew DeFreitas, assistant chief of psychiatry at the Veterans Administration Hospital, and Mr. Joseph Paskran, a clinical social worker, who reported that appellant was undergoing treatment at the Veterans Administration Hospital for his service-connected disability, post-traumatic stress disorder, which treatment commenced on April 7, 1986 and would conclude on June 9, 1986 and that the purpose of the treatment was to alleviate "symptoms exacerbated by current stressors in his environment of which are said by [appellant] to be particularly pronounced at, but not limited to, his employment." Appellant also submitted the June 2, 1986 discharge report of Dr. DeFreitas who stated that appellant's condition upon discharge from the treatment program was good but that appellant remained unemployable for the next three months. Appellant also submitted the July 3, 1986 report of Dr. Richard J. Daly, a Board-certified psychiatrist, who stated that appellant has been under his care since his discharge from treatment at the Veterans Administration Hospital and that appellant continued to "suffer from many emotional problems which are directly related to his experience in combat while serving in Vietnam."

Appellant also submitted a statement in which he alleged that his reputation and health were damaged by the utilities superintendent under whom he worked and who, according to appellant, made false and malicious statements about appellant, required him to take courses on subjects with which he was already familiar and in which he had prior training, and refused him permission to telephone his spouse and deliver medication when he was in need of such for his spastic colon condition. Appellant stated that as a result of these circumstances he suffered a nervous breakdown which resulted in his hospitalization from January 27, 1986 to January 31, 1986. Appellant also submitted a January 27, 1986 employing establishment employee counseling form which advised that on that date appellant had been counseled for "failure or delay in carrying out orders, work assignments or instructions." In addition to the foregoing items, appellant submitted copies of various documents related to his employment but not directly related to the alleged traumatic injury on December 30, 1985.

Appellant subsequently submitted letters dated February 15, 1987 and March 1987 which letters, *inter alia*, requested information on the status of his claim, and alleged that his supervisors were deliberately aggravating his service-connected disability, threatening to fire him and harassing him with respect to pursuit of his workers' compensation claim. Appellant enclosed with these letters, *inter alia*, the job description of a boiler plant operator, and a January 14, 1987 and a March 4, 1987 report of Dr. Daly which addressed the status of appellant's condition and discussed additional recommended treatment.

By compensation order dated March 17, 1987, which incorporated a memorandum summarizing the evidence, the Office reviewed appellant's case on the merits under 5 U.S.C. section 8128 and denied modification of its July 21, 1986 decision on the basis that the evidence submitted by appellant was insufficient to warrant modification of the prior decision. In the memorandum, the Office noted that appellant failed to submit an account of the events which occurred on December 30, 1985 alleged to have caused his chest pains and emotional condition and that he failed to submit a well-reasoned medical report describing the events which occurred on December 30, 1985 and explaining how such events caused or precipitated appellant's chest pains and emotional condition. The Office noted that the medical reports submitted by appellant established that appellant suffers from post-traumatic stress syndrome secondary to his military service in Vietnam and indicated that appellant's disability is primarily related to this condition. The Office noted that, while several reports indicated that stressful factors of appellant's employment may contribute to this condition, none of the medical reports elaborated on this issue. The Office noted that appellant's personal narrative statements indicate that he experienced problems over a long period of time and advised him that the possibility exists that he has a claim for an occupational disease and informed him that occupational disease refers to a condition caused by employment factors occurring during a single workshift and that he could file such a claim if he believed his condition met this criteria.

By letter dated December 15, 1987, appellant requested reconsideration of his case and, in support of his request, submitted, with respect to medical evidence, the office notes of Dr. Morris J. Seligman, a psychiatrist with the Veterans Administration Hospital, pertaining to sessions with appellant held on May 28, 1985, October 30, 1985 and November 13, 1985 and which notes contained an October 30, 1985 entry which stated that appellant claimed he was feeling harassed at work. Appellant also submitted a January 7, 1986 report of Dr. John P. Scamman, a consulting psychiatrist with the York County Counseling Services, who stated that he first saw appellant on May 15, 1984 for his service-connected post-traumatic stress disorder and that appellant has been receiving treatment from the York County Counseling Services for the past three years and that "currently [appellant] is experiencing an exacerbation of his nervous condition which at least in part appears related to his current work situation." Appellant also submitted additional copies of Dr. Albertson's January 15, 1986 report, Dr. Poulin's February 13, 1986 report and Dr. Gottlieb's February 21, 1986 report.

With respect to factual evidence, appellant submitted, *inter alia*, a December 30, 1985 letter of reprimand which he received from the utilities general foreman advising appellant that such letter was issued as disciplinary action "because of careless workmanship resulting in potential damage to government property" due allegedly to appellant's use of excessive water on October 24, 1985 while cleaning the boiler plant room, which resulted in flooding to the surrounding area. The letter of reprimand also documented meetings among appellant, the utilities general foreman and certain other employees held on November 8, 1985 and November 15, 1985 regarding the flooding incident and an incident in which appellant allegedly reported a coworker had a heart attack but which report the employing establishment subsequently determined was ground-less. Appellant also submitted two memoranda dated August 16, 1985 and August 22, 1985 from the employing establishment's director of industrial relations responding to appellant's complaints of inequities in training opportunities and advising appellant that an investigation was made into this matter and no inequities were uncovered.

Appellant also submitted a copy of a December 29, 1987 letter to U. S. Senator John Kerry in which appellant described the problems he had encountered with his employment. Appellant stated that his problems commenced when he was promoted to a boiler plant operator and was discriminated against by his superintendent who, appellant alleged, accused him of being a former mercenary and advised appellant that he believed appellant to be a threat to the safety of his coworkers and that he was "going to do everything possible" to remove appellant from his unit. Appellant claimed that the superintendent "interrogated" him almost daily about his tour of duty in Vietnam and that he suffered similar abuse from the employing establishment's employee relations officer who, appellant alleged, also accused appellant of being a former mercenary. Appellant stated that he began "breaking down" under this environment and that on December 30, 1985 he suffered chest pains and a nervous attack following a disciplinary action meeting at which he received a reprimand. Appellant stated that he filed a traumatic injury claim as a result of this incident, alleging that his work environment exacerbated his service-connected disability. Appellant further claimed that upon his return to work following the filing of his claim his supervisor engaged in retaliatory actions such as relieving appellant of his regular duties and refusing him sick leave and leave for medical appointments. With his December 15, 1987 request for reconsideration, appellant also submitted copies of miscellaneous documents submitted with his previous request for reconsideration and documents unrelated to the issue at hand.

Appellant subsequently submitted letters dated December 30, 1987 and January 20, 1987 requesting that the chief of the Office's Branch of Claims not participate in the adjudication of his claim, alleging that this person exhibited prejudice against Vietnam veterans.

By compensation order dated February 24, 1988, which incorporated a memorandum summarizing the evidence, the Office reviewed appellant's claim on the merits under 5 U.S.C. section 8128 and denied modification of its July 21, 1986 decision on the basis that the evidence submitted by appellant in support of reconsideration was insufficient to warrant modification of the prior order. The Office found that with respect to factual evidence, appellant failed to provide a description of the events which occurred on December 30, 1985 alleged to have caused his chest pains and emotional condition and that with respect to medical evidence, the medical reports submitted lacked an accurate history of the events which occurred on December 30, 1985 as well as a reasoned medical opinion as to how such events caused or precipitated appellant's condition. The Office again advised appellant that the possibility exists that he has a claim for an occupational disease and that he may file such claim if he believed his condition met the criteria for occupational disease.

The Board finds that appellant has not met his burden of proof in establishing that he sustained a traumatic injury on December 30, 1985 following a disciplinary action meeting held on that date.

A person who claims benefits under the Federal Employees' Compensation Act [1] as the result of a traumatic injury has the burden of establishing the essential elements of his claim,[2] including the fact that he sustained a traumatic injury while in the performance of duty and that he had disability as a result.[3] Section 10.5(a)(15) of Title 20 of the Code of Federal Regulations defines traumatic injury as follows:

> "'Traumatic injury' means a wound or other condition of the body caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected. The injury must be caused by a specific event or incident or series of events or incidents within a single work day or work shift."[4]

In the instant case, appellant has alleged that he sustained a traumatic injury, specifically chest pains and an emotional condition on December 30, 1985 at the employing establishment following a disciplinary action meeting at which he received a reprimand. However, the factual and medical evidence submitted by appellant in support of his claim does not establish that the conditions for which he claims compensation resulted from a specific event or series of events or incidents occurring within a single work day, nor does the weight of the medical evidence establish that appellant's conditions are employment related.

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[1] 5 U.S.C. section 8101 *et seq.*

[2] *Margaret A. Donnelley*, 15 ECAB 40 (1963).

[3] *Daniel R. Hickman*, 34 ECAB 1220 (1983).

[4] 20 C.F.R. section 10.5(a)(15).

With respect to factual evidence, appellant submitted several narrative statements in support of his claim describing employment incidents in which he was allegedly harassed and discriminated against by his supervisors. However, none of the employment incidents described by appellant with relative detail occurred on December 30, 1985 but rather they occurred in the weeks preceding and succeeding that date. With respect to the date of December 30, 1985, appellant has only stated that a disciplinary action meeting was held at which he was reprimanded by his supervisors and threatened with firing.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. The Board has repeatedly held that a disabling condition resulting from an employee's feeling of job insecurity *per se* is not sufficient to constitute a personal injury sustained while in the performance of duty within the meaning of the Act.[5] Appellant's statement that a disciplinary action meeting was held on December 30, 1985 *prima facie* implies nothing more than that appellant may have experienced anxiety in relation to job security, which is not compensable under the Act. The Office of Workers' Compensation Programs requested several times that appellant submit a detailed description of the events which occurred on December 30, 1985, but no such statement was submitted. Accordingly, the factual evidence currently of record fails to establish that the condition for which appellant claims compensation constitutes a traumatic injury within the meaning of 20 C.F.R. section 10.5(a)(15).

Similarly, the medical evidence also fails to establish that appellant sustained an employment-related traumatic injury on December 30, 1985. The only medical report which made reference to any event or events occurring on December 30, 1985 was the January 15, 1986 report of Dr. Albertson, a Board-certified internist, who examined appellant on December 30, 1985. Dr. Albertson's report incorporated appellant's statements that he had had a confrontation with management on that date and that such confrontations had been going on for some time, but the doctor offered no medical opinion as to whether he believed appellant's diagnosed conditions of "chest wall syndrome of left pectoral muscle and adjustment disorder" were attributable to the confrontation or confrontations described by appellant.

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[5] *See Lillian Cutler*, 28 ECAB 125 (1976). In *Lillian Cutler*, the Board discussed at length the principles applicable to various circumstances involving disabling emotional reactions by employees to employment factors. There are situations where a disabling emotional condition has some connection with the employment but nevertheless does not come within the coverage of the Act because such condition was found not to have arisen out of the employment. For example, disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position or to secure a promotion. On the other hand, disability is covered where it results from an employee's emotional reaction to his regular or specially-assigned work duties or to requirements imposed by the employment.

To establish entitlement to compensation under the Act for a traumatic injury, appellant, in addition to establishing the fact that a traumatic injury, as defined by 20 C.F.R. section 10.5(a)(15), occurred must also establish that such injury caused disability. To establish that disability was sustained, appellant must furnish rationalized medical opinion evidence which must be based on a complete factual and medical background of appellant and which shows, using medical terminology, how the conditions for which appellant claims compensation are causally related to the specific event or events which appellant alleges caused his disability.[6] Appellant did not submit such a medical report and he, therefore, failed to discharge his burden of proof in establishing that he sustained an employment-related disability as a result of an alleged traumatic injury on December 30, 1985.

The Board has held that an award of compensation may not be based on surmise, conjecture or speculation.[7] The mere fact that a disease or condition manifests itself during a period of employment is not sufficient in and of itself to establish that there is a causal relationship between the employment and the condition.[8] Accordingly, the fact that a disciplinary action meeting was held on December 30, 1985 at which appellant received a reprimand and the fact that he suffered chest pains and became emotionally upset at or following such meeting does not constitute evidence sufficient to establish causal relationship. Causal relationship cannot be inferred.[9] Appellant must describe the events that occurred during and, if applicable, immediately prior to the meeting in order that the Office may determine whether appellant's alleged disabling reaction to such meeting is compensable under the Act.[10] Appellant must also submit medical evidence as heretofore described which supports that appellant's disability is causally related to the December 30, 1985 employment incident. The evidence appellant submitted in support of reconsideration did not meet this criteria, and therefore the Office by its decisions dated March 17, 1987 and February 24, 1988 properly denied modification of its prior order dated July 21, 1986.

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[6] *William Nimitz, Jr.*, 30 ECAB 567 (1979).

[7] *Id.*

[8] *Birger Areskog*, 30 ECAB 571 (1979).

[9] *Margaret Donnelley*, note 2 *supra*.

[10] *See Lillian Cutler*, note 5 *supra*.

Appellant has alleged that his claim was not properly handled by the Office and that certain Office personnel exhibited prejudice against him. The Board finds that the record does not indicate prejudice or improper handling of appellant's claim by the Office. The Board has held that so long as the Office properly determines that the evidence of record fails to establish the requisite causal relationship, its obligation under the Federal Employees' Compensation Act has been met.[11] In the instant case, given the statutory and regulatory requirements imposed upon a claimant for establishing a traumatic injury claim,[12] the Board finds that the Office properly determined that the evidence failed to establish the requisite causal relationship between the employment incident of December 30, 1985 and appellant's alleged traumatic injury and therefore, the Office met its obligation under the Act.[13]

The decision of the Office of Workers' Compensation Programs dated February 24, 1988 is hereby affirmed.

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[11] *Arthur Benton Hauft*, 19 ECAB 351 (1968).

[12] *See* 5 U.S.C. section 8119; 20 C.F.R. sections 10.110(a) and 10.5(a)(15).

[13] The Board notes that the Office in its March 17, 1987 and February 24, 1988 decisions advised appellant that while the factual and medical evidence which he submitted failed to substantiate his claim that he sustained a traumatic injury on December 30, 1985, such evidence indicated the possibility that he may have a compensable claim for occupational disease. The Office informed appellant that occupational disease, in contrast to a traumatic injury, refers to a condition caused by employment factors or incidents occurring over a period of time greater than a single work shift and that if appellant believed his condition was caused by employment events and factors including but not limited to those alleged to have occurred on December 30, 1985, he may file an occupational disease claim. Should appellant decide to file an occupational disease claim, he continues to bear the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by factors of his employment. This burden includes the necessity of furnishing both a chronological detailed description of the employment factors and events he believes to have caused his condition and a detailed physician's narrative report which reviews the factors of employment believed by appellant to have caused his condition and, taking into consideration such factors as well as findings upon examination of appellant, appellant's social history and medical history, including preexisting conditions, provides the physician's opinion whether the employment factors caused or aggravated appellant's condition and supports such opinion with medical rationale.

In the Matter of LOUIS L. JACKSON, SR. *and* DEPARTMENT OF THE AIR FORCE, AIR FORCE PRINTING SERVICE, KELLY AIR FORCE BASE, San Antonio, Tex.

Docket No. 88-987; Submitted on the Record;
Issued August 2, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has more than a 13 percent impairment of the right leg.

The case has been on appeal previously.[1] In a December 9, 1987 decision, the Board found that Dr. James W. Simmons, a Board-certified orthopedic surgeon acting as an impartial specialist in this case, had not discussed whether appellant had a hammer toe deformity of the fourth right toe and had not taken into consideration subjective factors such as decreased sensation and pain in determining the degree of the permanent impairment of the right foot. The Board remanded the case so that Dr. Simmons could clarify his opinion on this point and state whether appellant's impairment was confined to the right foot or extended to the right leg.

In a January 15, 1988 letter the Office of Workers' Compensation Programs asked Dr. Simmons to clarify the points raised by the Board. The Office authorized Dr. Simmons to recall appellant for another examination if necessary. In a February 17, 1988 report of his February 2, 1988 examination, Dr. Simmons stated:

> "There is a normal range of motion of his right and left hallux. There is an osteophyte in the dorsal aspect of his [metatarsophalangeal] joint tender to palpation. The deformities and range of motion of his right toes are as recorded on his initial evaluation of 6/11/87. There is a hammer toe deformity of the right fourth toe which is more severe than a similar hammer toe deformity on the left side. There are also nonpainful callus formation on the plantar aspect of the left forefoot. The patient has sensory loss over both the dorsal and plantar aspect of the right forefoot in the first, second and third interspaces. The sensory loss is more marked on the dorsal aspect. The

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[1] Docket No. 87-1758, issued December 9, 1987. The history of the case is contained in the prior appeal and is incorporated by reference.

range of motion and the impairment for the second and third toes are as noted on the report of 6/11/87.

"Roentgenographic studies show that the distal end of the proximal phalanx bone has been resected on the second and third toes. There also appears to be a shortening of the third metatarsal, but it does not appear that he had any previous surgical procedure at this level. On the lateral view there is some osteophyte formation at the metatarsal cuneiform joint and a small amount at the dorsum of the navicular.

"Impression is previous history of trauma to the right foot with subsequent development of hemitoe deformity of the second and third toes by history and status post resection arthroplasty of the PIP [proximal interphalangeal joint] of the second and third toes with tonotomy and capsulotomy of the metatarsophalangeal joints of the second and third toe.

"On specific review of the right fourth hammer toe, there is a hammer toe deformity of the right fourth toe with ankylosis at the distal IP [interphalangeal] joint which corresponds to an 80 percent impairment of this toe and translates to a two percent impairment of the whole foot.

"Considering the right hallux, there is 20 degrees of plantar flexion at the IP joint or a loss of 10 degrees which translates to a 15 percent impairment of the hallux. At the metatarsal phalangeal joint there is only 10 degrees of plantar flexion or a loss of 40 degrees which translates into a 28 percent impairment of the hallux. The combined values of impairment of 15 plus 28 plus three percent which translates to an eight percent loss of the whole foot. The combination of the impairment of the whole foot related to the fourth right hammer toe and the right hallux is two plus eight percent equals 10 percent. When we add this 10 percent of the whole foot to the five percent previously awarded to the second and third toe, we come up with a 15 percent impairment for the total foot.

"When considering the loss of sensation and pain involved with the right foot in the distribution of the L5 dermatomes, employing the appropriate tables in the AMA guidelines, we come up with a three percent impairment for the whole right leg. The 15 percent impairment for the right foot is equivalent to 11 percent impairment for the right leg. This adds up to 14 percent for the right leg which using the AMA tables translates to a 6 percent impairment for the whole body."

In a March 5, 1988 memorandum, an Office medical adviser reviewed Dr. Simmons calculations. He stated that appellant had a 15 percent impairment of the great toe due to loss of plantar flexion in the interphalangeal joint and a 28 percent impairment due to loss of plantar flexion in the metatarsophalangeal joint. Using the Combined Values Table [2] the medical adviser indicated that appellant had a 39 percent impairment of the great toe which equalled a seven percent impairment of the right foot.[3] The medical adviser reported that appellant had a 29 percent impairment of the second toe due to loss of dorsiflexion in the metatarsophalangeal joint and a 21 percent impairment due to loss of plantar flexion in the metatarsophalangeal joint which equalled a 50 percent impairment of the second toe. He noted that appellant had an additional 50 percent impairment of the second toe due to ankylosis of the proximal interphalangeal joint in the neutral position.[4] He stated that appellant had a combined 75 percent impairment of the second toe which equalled a two percent impairment of the foot.[5] The medical adviser indicated that appellant had a 30 percent impairment of the third toe due to loss of dorsiflexion in the metatarsophalangeal joint and a 20 percent impairment due to loss of the plantar flexion for a total 50 percent impairment of the toe. He pointed out the appellant had an additional 80 percent impairment of the third toe due to ankylosis at 30 degrees flexion of the proximal interphalangeal joint. He concluded that the combined impairment of the third toe was 90 percent which equalled three percent of the foot. He stated that appellant had an 80 percent impairment of the fourth toe due to ankylosis of the interphalangeal joint which equalled a three percent impairment of the foot. The medical adviser calculated that appellant had a three percent impairment of the right leg due to pain and loss of sensation which he concluded equalled a four percent impairment of the foot.[6] The medical adviser combined the impairments for the loss of motion of each toe and for pain and loss of sensation and concluded that appellant had an 18 percent impairment of the right foot which equalled a 13 percent impairment of the right leg.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984), pp 240-242.

[3] AMA *Guides*, Tables 25 p. 28.

[4] The actual figure should be 45 percent. AMA *Guides*, Table 27, p. 30. This is harmless error though as the combined impairment of the second toe would be 73 percent rather than 75 percent which still equals a 2 percent impairment of the foot.

[5] AMA *Guides*, Table 32, p. 33.

[6] AMA *Guides*, Table 34, p. 35.

An Office claims examiner indicated that an 18 percent impairment of the foot would equal 36.9 weeks in a schedule award while a 13 percent impairment of the leg would equal 37.44 weeks of compensation in a schedule award.[7] He pointed out that appellant had already received 29.46 weeks of compensation in five previous schedule awards for the right leg or parts thereof. He recommended that appellant be paid for a 13 percent impairment of the leg, subtracting the amount paid under previous schedule awards, which equalled 7.98 weeks of compensation under a schedule award.

In a March 17, 1988 decision, the Office issued a schedule award for a 13 percent impairment of the right leg, less the amount paid under previous schedule awards.

The Board finds that appellant has a 14 percent impairment of the right leg.

The Office medical adviser properly used the AMA *Guides* as applied to each toe to arrive at the individual percentages of impairment of the right foot due to loss of motion and ankylosis of the toes. He also properly calculated the amount of impairment of the right leg due to pain and loss of sensation in the right foot. However, he improperly combined these values together in arriving at the conclusion that appellant had a 10 percent impairment of the right foot which equalled 13 percent impairment of the right leg. Under the AMA *Guides* the impairments of the foot caused by each toe are added together, not combined together under combined values table as the medical adviser did.[8] The impairments caused by each toe (seven percent for the great toe, two percent for the second toe, three percent for the third toe and three percent for the fourth toe) would equal a 15 percent impairment of the right foot. This was the calculation used by Dr. Simmons. Dr. Simmons then converted the 15 percent impairment of the right foot into an 11 percent impairment of right leg and then included the impairment at the right leg caused by pain and loss of sensation. The medical adviser improperly converted the three percent impairment of the right leg caused by subjective factors, into a four percent impairment of the right foot, combined it with the percent of impairments due to loss of motion in the toes and then converted the resulting 18 percent impairment of the toes into a 15 percent impairment of the leg. In calculating a schedule award, an Office medical adviser should convert the percentage of impairment due to subjective factors from the percentage of the leg to percentage of the foot or a toe only if the schedule award is being given solely for an impairment of the foot or a toe. If the schedule award is being given for impairment of the leg, then the percentage of impairment of the smaller units of the leg due to loss of motion, such as the toes and the foot, should be converted into a percentage of impairment of the leg and then combined with the percentage of impairment of the leg due to subjective factors. Dr. Simmons followed this procedure in properly calculating appellant's impairment of the right leg.

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[7] Under the Federal Employees' Compensation Act parts of the body are listed on a schedule of the number of weeks compensation would be paid for a total loss of use of that part. The foot is listed as 205 weeks while the leg is listed as 288 weeks. If a claimant has less than a total loss of use, he receives a schedule award in proportion to the partial loss of use of that part. For example, an 18 percent impairment of the foot equals 36.9 weeks of compensation (18 x 205 = 36.9). See 5 U.S.C. section 8107.

[8] AMA *Guides*, p. 32.

The decision of the Office of Workers' Compensation Programs, dated March 17, 1988, is amended to give appellant a schedule award for a 14 percent impairment of the right leg and is affirmed as amended.

In the Matter of DAYCON C. HOGUE *and* DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTE OF HEALTH, Bethesda, Md.

Docket No. 88-640; Submitted on the Record;
Issued August 3, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity effective February 15, 1987 based on his actual earnings as a clerk-typist.[1]

On March 18, 1986 appellant, a 36-year-old warehouse worker, sustained injuries to his left leg and pelvis, while operating a forklift in the performance of his duties. He stopped working that day and was treated by Dr. Philip D. Bobrow, an orthopedic surgeon. Dr. Bobrow hospitalized appellant on March 18, 1986, and performed an exploration of the proximal and distal popliteal artery, repair of distal popliteal artery with saphenous vein patch graft and anastomosis to anterior tibial artery. Appellant was discharged on April 26, 1986. Dr. Bobrow ultimately diagnosed his condition as follows: fracture of left acetabulum; crush injury to pelvis; left perioneal nerve palsy; and superpubic abscess.[2] The doctor indicated that these conditions resulted from the March 18, 1986 employment incident.

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[1] *See infra* note 3.

The Office of Workers' Compensation Programs accepted appellant's claim for contusion of the left leg, and fracture of the pelvis and acetabulum. The Office authorized continuation of pay for the period March 19, 1986 through May 2, 1986, and commencing May 3, 1986 paid him compensation benefits for temporary total disability.

Appellant remained under Dr. Bobrow's care who continued to submit progress reports. In an August 22, 1986 progress report Dr. Bobrow stated that appellant would probably be capable of returning to work within two to three months. In a September 30, 1986 progress report Dr. Bobrow indicated that appellant would begin to investigate the possibility of returning to work in a light-duty capacity. The doctor noted in an October 20, 1986 progress report that "if there is light duty available this will be discussed with him to see if this can be considered."

The record reveals that by letter dated December 15, 1986 an employing establishment official advised appellant that the employing establishment's occupational service and Dr. Bobrow had reviewed his medical records to assess his medical condition, and that as a consequence it was determined that he was incapable of carrying heavy loads while standing; that he was capable of performing limited duty requiring no walking; and that he should feel free to stand as needed. The official further advised appellant that he was capable of working on a part-time basis for four hours per day for a two-week period and to gradually increase this to full time. Accordingly, the official stated that the employing establishment was offering him the part-time position of a clerk-typist, GS-322-4, in the Inventory Section, which entailed sedentary work "in a normal office setting," and that he would not be expected to perform any duties that exceeded his physical limitations. The official pointed out that the employing establishment's ultimate goal was for him to return to his date-of-injury position.

Appellant accepted the employing establishment's offer and effective December 19, 1986 returned to work on a part-time basis as a clerk-typist. Appellant worked 32 hours per week and for the remaining hours assumed a leave-without-pay status.

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[2] The record reveals that appellant was hospitalized on March 31, 1986 for a debridement and skin grafting of the ulcer of the left lower leg.

Appellant continued working as a clerk-typist until February 3, 1987. He submitted a report by Dr. Bobrow dated February 11, 1987, who reported that he was treating appellant for an employment-related injury and that he was advising appellant to remain off from work because of back and left leg pain.

The record reveals that on February 5, 1987 the Office computed appellant's loss of wage-earning capacity based on his actual earnings, $173.80 per week, based on his ability to perform the duties of a clerk-typist. The Office determined that appellant had a 50 percent wage-earning capacity or a 50 percent loss of wage-earning capacity based on his ability to perform the duties of this position.

Dr. Bobrow referred appellant to Dr. Jeff Jacobson, a neurosurgeon, for consultation. Dr. Jacobson concluded on February 16, 1987 that appellant suffered from acute and chronic lumbar radiculitis with L5 radiculopathy on the left. The doctor noted that "much of" the neurologic deficit was due to his old peripheral injury, and that he had chronic radicular-type pain with a large disc evidenced by computerized tomography (CT) scan. Dr. Jacobson scheduled appellant for a magnetic resonance imaging (MRI) of the lumbar spine and lower thoracic spinal cord, which was conducted on February 28, 1987. The results of the MRI demonstrated a herniated nucleus pulposus at L4-5 "with a large fragment present within the spinal canal," and a bulged disc also at L3-4. As a result of this diagnostic test, Dr. Jacobson reported on March 6, 1987 that he recommended a laminectomy and disc excision. The doctor did not address causal relationship.

Appellant submitted an attending physician's supplemental report, form CA-20a, by Dr. Bobrow dated March 9, 1987 who stated that he last examined appellant on February 11, 1987 and that he was currently under Dr. Jacobson's care. Dr. Bobrow diagnosed compartment syndrome of the lower left leg, fracture of the proximal fibula, and a herniated lumbar disc, indicating by checking the box marked "yes" that these conditions were causally related to the March 18, 1986 employment injury. Dr. Bobrow concluded that appellant was totally disabled for work.

By letter decision dated March 23, 1987 [3] the Office advised appellant that the evidence of record demonstrated that he was no longer totally disabled and that he was capable of performing the duties of a clerk-typist effective February 15, 1987.[4]

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[3] The Office initially prepared this letter decision for issuance on February 24, 1987.

[4] The record reveals that in computing appellant's wage-earning capacity effective February 15, 1987, the Office noted that appellant had been paid compensation benefits for temporary total disability for the period December 29, 1986 through February 14, 1987 as opposed to compensation benefits based on a partial disability

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity effective February 15, 1987 based on his actual wages as a clerk-typist.

Section 8115(a) of the Federal Employees' Compensation Act[5] provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."

Following the March 18, 1986 employment injury, appellant returned to work effective December 19, 1986 in the limited-duty capacity of a clerk-typist. The employing establishment had offered this position to appellant in writing on December 15, 1986. Although appellant continued under the care of Dr. Bobrow, an orthopedic surgeon, who submitted progress reports on a periodic basis, appellant successfully performed the duties of a clerk-typist until February 3, 1987. Appellant submitted a February 11, 1987 report by Dr. Bobrow who stated that he was treating appellant for an employment-related injury and had advised him to discontinue working as a result of back and left leg pain. The Board notes that the Office did not compute appellant's loss of wage-earning capacity based on his actual earnings in performing the duties of a clerk-typist until February 5, 1987, two days after appellant stopped working. The Board further notes that it did not issue its final decision notifying appellant that it had determined he was capable of performing the duties of a clerk-typist based on his actual earnings until March 23, 1987, over one month after appellant had ceased performing such duties. Moreover, the effective date of the loss of wage-earning capacity determination was retroactive to February 15, 1987, 12 days following the date appellant ceased working as a clerk-typist.

With regard to actions by the Office after a claimant has been reemployed, the Office's Procedure Manual provides in pertinent part as follows:

> "10 *Actions After Reemployment Through OWCP Efforts.* Cases where a claimant stops work after reemployment may require further action depending on the circumstances under which the work stoppage occurs. Because a claimant may not be rated for loss of wage-earning capacity on the basis of actual earnings if he/she is not actually performing the job at the time the rating is done, the actions described below will differ

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[5] 5 U.S.C. section 8115(a).

according to whether the rating has been completed at the time the work stoppage occurs.

"a. *Prior to Rating.* If a claimant who has returned to work then ceases to work before the rating can be accomplished, it will be necessary to query him/her as to the reasons for ceasing work.

> '(1) If the reasons constitute an argument for recurrence, appropriate development and evaluation of medical evidence will be undertaken, and the claimant will continue on TTD [temporary total disability] until he/she can return to duty. If return is not possible, the CE [claims examiner] should contact the employing agency to ascertain whether different work can be provided. If these efforts are unsuccessful, the CE will need to refer the claim to the RS [rehabilitation specialist].
>
> '(2) If the reasons are deemed acceptable, compensation for TTD will continue and efforts to identify appropriate employment will resume, either with the federal agency or with other employers. If the claimant was reemployed with the original agency, the CE may refer the case to the RS for further placement efforts with the agency.
>
> '(3) If the reasons are not deemed acceptable, 5 U.S.C. 8106(c)(2) may be invoked to terminate benefits.' "[6]

In the instant case, appellant returned to work and ceased working as a clerk-typist before the loss of wage-earning capacity rating was "accomplished" which was effective February 15, 1987. Accordingly, the Office should have followed its procedures in determining appellant's loss of wage-earning capacity. Since it did not, the Board finds that the Office improperly determined appellant's loss of wage-earning capacity effective February 15, 1987, based on his actual earnings of a clerk-typist.[7]

The decision of the Office of Workers' Compensation Programs, dated March 23, 1987, is hereby reversed.[8]

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[6] Federal (FECA) Procedure Manual, *Reemployment and Rehabilitation*, Part 2—Claims, Chapter 2-813.10(a).

[7] *See e.g. Fannie Barnes*, Docket No. 86-1651 (issued November 5, 1986). (The Board found that the Office improperly based appellant's wage-earning capacity effective March 30, 1986 on her actual wages as a teacher's aide from September 3, 1985 to March 15, 1986. The Board noted that appellant had begun working in that capacity on September 13, 1985, ceased on March 15, 1986, and alleged that such cessation was due to the effects of the employment injury. The Board, citing to the above-mentioned section of the Office Procedure Manual, found that the Office had not followed its established procedures in determining appellant's loss of wage-earning capacity as she was not actually performing the job at the time the rating was accomplished.)

[8] The case record contains evidence which was submitted following the issuance of the Office's March 23, 1987 decision and was not accompanied by a formal request for reconsideration. Since this evidence was not before the Office at the time it issued its final decision, the Board concludes that it has no jurisdiction to review it. *See* 20 C.F.R. section 501.2(c).

In the Matter of DAVID PEISNER *and* DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Miami, Fla.

Docket No. 87-795; Hearing June 16, 1988;
Issued August 3, 1988

Appearances: *Charles O. Farrar, Jr., Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's heart condition is causally related to factors of his federal employment.

On April 9, 1980 appellant, a 37-year-old special agent, filed a Form CA-2, notice of occupational disease and claim for compensation, alleging that he developed coronary heart disease which he attributed to factors of his federal employment. Appellant stated that he initially became aware of the conditon on January 21, 1980 and that he related it to his employment on March 27, 1980 following a catheterization.

In a statement which accompanied the claim form, appellant recounted that he first realized he had a heart problem when he was treated in a hospital emergency room on January 21, 1980 for chest pain; that prior to that date he had worked for one week in a private investigative firm; that he was hospitalized from January 23 to 29, 1980 for diagnostic testing; that after returning to work for a few hours, he experienced a myocardial infarction on January 31, 1980 for which he was hospitalized; and that he was discharged on February 14, 1980. Appellant noted that he was again hospitalized from March 26 to 27, 1980 for a heart catheterization and that at this time he related the heart condition to his employment factors.

Appellant went on to describe in his statements his duties stating that he had only worked at the employing establishment for three weeks when he was requested to coordinate the evidence relative to the investigation involving Kent State. He explained that he felt pressure because "[e]verything was given an aura of immediacy and a requirement of infallibility." Appellant also stated that he was transferred to Las Vegas, Nevada where he worked overtime and had more convictions than any other agent. He was then transferred to San Francisco, California for six months and undertook a project which he was unable to accomplish prior to his transfer to Miami, Florida; thereby, resulting in feelings of uncertainty which caused a strain on him and other agents. Following his transfer to Miami, appellant stated that he was assigned "white-collar crime work—specifically, frauds," and for the next four years handled approximately 40 cases at any one given time. He pointed out that currently the employing establishment acknowledges that five to ten of these types of cases is a manageable number. He further pointed out that he had complained to his supervisor about the workload; however, there was not enough manpower with which to equitably share the case load. Appellant added that he experienced additional pressure when he created "a school" to teach the subject of fraud to other agents from across the country, which assisted in adding additional pressures on him; this also caused him to think of securing other employment. Moreover, appellant stated that while contemplating other employment, he became the subject of an investigation regarding allegations "made by 'an informant' that he had sold information to drug smugglers from his home. He noted that the investigation began in May 1979 and had not resolved when he left the employing establishment in October 1979.[1] He further noted "that this matter has been resolved and found to be without merit." Appellant stated that as a result of this investigation he became so distressed that he resigned "in the midst of this prolonged administrative inquiry, knowing it would reflect poorly on me, but unable to cope with the pressures and stress of the situation." Appellant concluded that the stress inherent in his position, coupled with his workload and the "spurious investigation precipitated or directly caused the myocardial infarction."

To support his claim, appellant submitted medical records which included a January 21, 1980 hospital emergency report revealing that on that date appellant experienced pain in the kidney area radiating into the neck and left arm while playing racquetball. The pain lasted for ten to 15 minutes and has occurred two to three times since then. It was reported that this pain was not associated with nausea, shortness of breath or diaphoresis. Appellant was treated and underwent an electrocardiogram (EKG) which was normal. He was discharged that day and was advised to avoid strenuous activity.

The medical records also contained an attending physician's report and a narrative report by Dr. Morton Connor, a Board-certified internist, dated April 18, 1980 and October 6, 1980, respectively. Dr. Connor reported that appellant had experienced emotional stress over the past six months resulting from "intramural" problems at the employing establishment relative to his integrity and honesty. The doctor reported in both reports that he treated appellant for chest pain from January 23 to 29, 1980; that three days after his hospital discharge, appellant experienced an acute myocardial infarction for which he was treated by Dr. Phillip Samet, a Board-certified internist of professorial rank with a subspecialty in cardiovascular disease, and was hospitalized from January 31 to February 14, 1980; and that he again hospitalized appellant from March 26 through 28, 1980 and performed a cardiac catheterization. Dr. Connor noted in his October 6, 1980 report that appellant underwent revascularization surgery on May 9, 1980 at which time he received saphenous vein bypass grafts. The doctor diagnosed acute myocardial infarction of the anterior wall followed by revascularization surgery and that appellant was disabled since January 31, 1980. The hospital records containing a description of the aforementioned treatment were included among the medical records.

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[1] Appellant resigned effective October 1, 1979.

In response to an Office of Workers' Compensation Programs request for additional information, appellant submitted an October 7, 1980 statement reiterating his previous description of the implicated employment factors. To this statement appellant added that he began to suffer from angina following his transfer to Miami where he worked ten to eleven hours per day. Appellant also stated that it was difficult for him to maintain a dual identity while working at the employing establishment, i.e., an identity as a FBI agent during his "off hours," and "as a menial" during working hours. He explained that maintaining these identities caused a severe burden on himself and family. Additionally, appellant stated that as a consequence of a personality conflict between he and his new supervisor he was assigned, in March or April 1979, to a joint DEA (Drug Enforcement Agency)-FBI Task Force, and that such assignment did not cause him to experience angina until June or July of that year when he was advised that he was the subject of an investigation lodged against him by his supervisor following allegations made by an informant in his hometown. Appellant explained that the investigation began in May 1979, that he resigned in October 1979 because of the pressure of the investigation, that he experienced anxiety when the "administration" refused to reveal any information to him regarding the development of the investigation, that as a consequence he believed one of his coworkers had a vendetta against him, and that "the matter has been resolved and found to be without merit." Appellant added that he underwent a psychological evaluation conducted by Dr. Macolm Kushner, a clinical psychologist, as a result of the investigation. Appellant pointed out that prior to his January 20, 1980 experience of pain, he was treated in 1973 for bruxism caused by "a manifestation of anxiety or tension which was usually associated with stress; that in 1975 he underwent an examination conducted by a cardiologist as a result of stress; that during his assignment in Miami he experienced angina episodes; and that he experienced pain in the area of his kidney on January 15, 1980 while playing racquetball.

With respect to the 48 hours prior to his myocardial infarction, appellant relayed the following course of events: he was discharged from the hospital on January 29, 1980; he returned to work for approximately four hours on January 30, 1980; he worked a full eight-hour day on January 31, 1980; he and his wife joined friends for dinner after he had returned home from work; he experienced back pain when engaging in sexual intercourse with his wife; consequently, the paramedics transported him to the hospital where he was diagnosed as having had a myocardial infarction.

Appellant submitted an October 10, 1980 report by Dr. Kushner who stated that he treated appellant from February 15, 1979 through April 19, 1979 for stress and discussed his awareness of the investigation that took place which he stated was another source of stress for appellant. The doctor concluded that the employment-related stress "could have been a substantial contributing factor" to appellant's myocardial infarction.

Appellant also submitted statements by his coworkers who attested to the debilitating effect the employment-related stress had on his heart condition.

The employing establishment submitted appellant's personnel records, including a September 25, 1980 letter by a special agent in charge who stated that the duties performed by appellant were no more difficult or different than those performed by other employees.

By compensation order dated May 8, 1981, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim on the ground that he failed to establish that his disability was employment related.

Appellant, through his attorney, requested a hearing before an Office hearing representative, which was held on February 25, 1982. At the hearing appellant submitted a report by Dr. Jay S. Kerzner, a Board-certified internist of professorial rank with a subspecialty in cardiovascular disease, dated February 1, 1982, who stated that stress "may well have played a major role" in the angina and acute transmural anterior myocardial infarction, "occurring during and following a period of intense stress," which were superimposed on the presence of obstructive coronary disease. Appellant also submitted a February 15, 1982 report by Dr. Kushner who, after reviewing the internal investigation conducted by the employing establishment on him, concluded that it was "reasonably probable" that this investigation "was a significant factor in his subsequently suffering a myocardial infarction." Further, appellant submitted a February 22, 1982 report by Dr. Connor who concluded that the nature of appellant's work, which "was stressful even beyond notoriously known stressful work," specifically caused the coronary spasm which culminated into an acute myocardial infarction in February 1980.

By a decision dated June 29, 1982, finalized June 30, 1982, the Office hearing representative found that the case was not in posture for decision because of the submission of the reports from Drs. Connor, Kerzner, and Kushner, which although did not discharge appellant's burden, were sufficient to require further development; set aside the May 8, 1981 decision; and remanded the case for further medical development.

On remand, the Office referred the evidence of record to an Office medical adviser who opined on September 13, 1982 that there was no causal relationship between appellant's heart condition and employment factors as he was unable to agree that appellant's preexisting heart disease was employment related. He recommended the Office secure an opinion from a cardiologist.

Accordingly, the Office referred appellant to Dr. Samet for a current examination and an opinion on causal relationship. Dr. Samet reviewed the history of his treatment of appellant and his findings on examination and results of diagnostic testing in his July 29, 1983 report. Dr. Samet diagnosed arteriosclerotic heart disease, coronary artery disease, acute anterior wall myocardial infarction and angina pectoris. He concluded that appellant's myocardial infarction may be attributed to genetics and the stress he underwent pending the investigation against him. In response to an Office request for clarification, Dr. Samet replied on November 22, 1983 that he was unable "to state with any assurance" whether appellant's employment aggravated or accelerated his heart disease. The doctor added that the "basis" of appellant's problem was genetic and noted that appellant's myocardial infarction developed during sexual intercourse.

A second Office medical adviser reviewed the record and concurred with Dr. Samet's findings and conclusions.

By compensation order dated April 11, 1984, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim on the ground that he failed to meet his burden of proving that his disabling condition was employment related.

Appellant, through his attorney, requested a hearing before a second Office hearing representative which was held on January 15, 1985. At the hearing appellant resubmitted the October 6, 1980 and February 22, 1982 reports of Dr. Connor and submitted letters of commendation from the employing establishment. Additionally, appellant submitted a deposition taken from Dr. Samet on January 8, 1985 in which he testified in part that he was unable to assume that there was a causal relationship between appellant's symptoms relative to his heart condition and his employment. The doctor further testified that he was uncertain of whether there was a causal relationship between the stress appellant experienced and his angina.

Subsequent to the hearing but prior to the issuance of the Office hearing representative's decision appellant, through his attorney, submitted a deposition taken from Dr. Connor on February 5, 1985. Dr. Connor testified that there was a reasonable probability that appellant's myocardial infarction was causally related to his employment stresses, especially the criminal investigation. The doctor concluded that appellant suffered permanent damage as a result of the myocardial infarction, thereby preventing him from returning to work. He added that appellant was under a lot of stress during the investigation which caused him to experience humiliation and embarrassment, and the stress increased and/or became exacerbated toward the last days, resulting in his resignation and culminating in the myocardial infarction. The doctor cited medical studies in support.

By a decision dated and finalized February 26, 1985, the second Office hearing representative set aside the April 11, 1984 decision and remanded the case to the Office for further development regarding the issue of whether the medical evidence was sufficient to establish causal relationship.

On remand, the second Office medical adviser reviewed the record on May 23, 1985 and citing medical studies and literature opined that there was no evidence of record establishing a definite relationship between appellant's stress and the myocardial infarction.

The second Office medical adviser then went on to say the following:

> "Since there seems to be a conflict I would like to suggest the claimant be referred to Dr. Martin S. Belle, a certified internist and cardiologist, for a final opinion. . . ."

The Office declared a conflict in medical opinion between Drs. Connor, Kushner and Kerzner, on the one hand, and the second Office medical adviser, on the other hand, and referred appellant, together with the case record, a list of specific questions, and a statement of accepted facts, to Dr. Martin S. Belle, a Board-certified internist of professorial rank with a subspecialty in cardiovascular disease, for an impartial medical evaluation pursuant to 5 U.S.C. section 8123(a). Although the statement of accepted facts contained a detailed description of the employment factors appellant implicated as contributing to his heart condition, the Office did not distinguish which factors were employment related versus those factors which were not deemed to be employment related.

Dr. Belle examined appellant on August 29, 1985 and performed various diagnostic tests and laboratory work from that date through August 31, 1985. These results accompanied a September 11, 1985 report in which the doctor addressed the questions posed to him in the following manner:

> "(1) It is my belief that the claimant's myocardial infarction of 2/1/80 was not precipitated, aggravated, or accelerated, or proximately caused by the factors of employment.
>
> "There is no good evidence that stress causes an acute myocardial infarction. Studies that have been done are retrospective in nature and some of the recent work shows that it leaves a lot to be desired to even relate stress to the causes of acute myocardial infarction and arteriosclerotic heart disease. It is well-known that underlying arteriosclerosis must be present in order for thrombosis of the coronary artery to occur and thus myocardial infarction results.
>
> "The studies of the relationship of stress to myocardial infarction are retrospective in nature and there is no good prospective study done that relates stress to coronary heart disease and myocardial infarction.
>
> "The psychologist stated that he was a Type A. A recent study published in the New England Journal of Medicine shows that patients with Type A personalities after having

> bypass surgery do not have any more recurrence of myocardial infarcts than those that are not Type A.
>
> "(2) The coronary artery disease was not precipitated, aggravated, accelerated, or proximately caused by the factors of employment. Mr. Peisner has a very bad family history of coronary artery disease. His father died of myocardial infarction at age 42; an aunt at age 43. He has been an intensive smoker in the past: two packs a day until he had his heart attack, which is one of the great risk factors in the cause of atherosclerosis and precipitation of coronary thrombosis and myocardial infarction. As stated, aggravation did not occur and the answer is evident.
>
> "During the stress MUGA scan on Mr. Peisner, it is true that his ejection fraction is only 31% and rose very little with stress, but we achieved a peak heart rate of 123 beats per minute, and the duration of exercise was nine minutes, and there was no angina elicited, nor was there any arrhythmia elicited, nor any ST-T segment changes compatible with ischemia of the heart.
>
> "Mr. Peisner spoke about having a great number of premature beats. A 24-hour Holter showed that the average density was only two per thousand beats. However, there were some more supraventricular beats occurring about 56 per thousand. There was really no significant arrhythmia present.
>
> "I do not feel that Mr. Peisner is permanently and totally disabled; however, his work should be limited because of the limited ejection fraction that he has which does not increase on exercise. His heart showed mild hypokinesis; that is, mild lack of contraction in the infero, apical and septal regions."

The second Office medical adviser reviewed the record and stated that he concurred in Dr. Belle's findings and conclusions.

By compensation order dated January 2, 1986, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim on the ground that his disability was not causally related to factors of his federal employment.

Appellant, through his attorney, requested a hearing before a third Office hearing representative which was held on November 19, 1986. At the hearing appellant submitted a report by Dr. Robert J. Myerburg, a Board-certified internist of professorial rank with a subspecialty in cardiovascular disease, who, after discussing his findings on examination of appellant and the "possible" effect chronic stress had on the evolution of underlying coronary artery disease, concluded that appellant's employment stress "could have contributed to [the] evolution of manifestations of coronary artery disease although he could not establish a direct causal relationship between the chronic employment stress and the myocardial infarction. Dr. Myerburg explained that the criminal investigation exposed him to an "extraordinary form of chronic stress" causing insomnia, anxiety and fear, which could have caused his coronary artery disease to manifest. The doctor further concluded that there was "a distinct possibility that angina pectoris and myocardial infarction could have occurred as a result of the unique form of stress to which he was exposed. The doctor noted that appellant had a depressed ejection fraction and poor response to exercise which, he stated, was an irreversible consequence of his myocardial infarction. Accompanying Dr. Myerburg's report was a November 11, 1986 deposition taken from him in which he drew similar conclusions.

Appellant also submitted a September 25, 1986 deposition from Dr. Belle who stated that he was unaware of the ongoing investigation which resulted in appellant's resignation; and that although he was of the opinion that appellant's employment was stressful, he concluded that employment-related stress did not aggravate coronary artery disease.

Appellant also submitted a report by Dr. Jeremiah Ben-Zvi, a cardiologist, who reported on October 27, 1986 that stress and psychologic factors were risk factors for the development of a myocardial infarction. In a deposition taken from Dr. Ben-Zvi on November 18, 1986 the doctor testified that the secretiveness of the investigation against him, heightened the tension, stress and frustration experienced by appellant. The doctor further testified that it was "impossible to say" that the employment-related stress was not causally related to his myocardial infarction, and that it was "very probable that appellant's ongoing stress and anxiety were major factors in his acute myocardial infarction. Dr. Ben-Zvi noted that appellant had risk factors for the development of coronary artery disease, namely a strong family history of the disease and smoking, and that in addition to these risk factors "chronic stress in his type of employment played a role in the development of his coronary artery disease." With regard to whether the employment stress aggravated appellant's coronary artery disease, the doctor opined that to say such a relationship existed was speculative, in that there was no scientific proof that the type of stress to which appellant was exposed could contribute to the acceleration of his coronary artery disease.

By a decision dated January 16, 1987, finalized January 20, 1987, the third Office hearing representative affirmed the Office's prior decision finding that the weight of the medical evidence showed that appellant did not suffer from an employment-related disability.

The Board finds that the case is not in posture for decision and must be remanded for further development.

In order to resolve a conflict in medical opinion between appellant's attending physicians, Dr. Connor, a Board-certified internist, Dr. Kushner, a clinical psychologist, and Dr. Kerzner, a Board-certified internist of professorial rank with a subspecialty in cardiovascular disease, on the one hand, and the second Office medical adviser on the other hand, the Office referred appellant, a statement of accepted facts, a list of specific questions, and the case record to Dr. Belle, a Board-certified internist of professorial rank with a subspecialty in cardiovascular disease, for an impartial medical evaluation.

Following his examination of appellant on August 29, 1985 and the diagnostic workup conducted from that date through August 31, 1985, Dr. Belle reported on September 11, 1985 that appellant's myocardial infarction of February 1, 1980 was neither precipitated, aggravated, accelerated, nor proximately caused by factors of his federal employment, and that appellant's coronary artery disease was neither precipitated, aggravated, accelerated, nor proximately caused by employment factors.

The Board notes, however, and the Director of the Office concedes on appeal, that the statement of accepted facts submitted to Dr. Belle did not indicate those factors implicated by appellant as contributing to his heart condition which would be deemed employment factors and those factors which would not be.[2] As the Board has held, in cases where working conditions are alleged as a factor in causing disability, as here, the Office as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed factors of employment and which are not deemed factors of employment and may not be considered, prior to submitting the case record to a medical expert for his opinion as to causal relationship.[3] Accordingly, the Board finds that it was improper for the Office to refer the statement of accepted facts and case record to Dr. Belle for his expert medical opinion on causal relationship without first making specific findings as to which of the working conditions implicated by appellant as having played a role in causing his disabling heart condition constituted factors of his federal employment and should have been considered in arriving at his opinion on causal relationship.

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[2] *See George Derderian*, 33 ECAB 1910 (1982); Federal (FECA) Procedure Manual, Chapter 2-809.13(c), *Statements of Accepted Facts*, Part 2—Claims.

[3] *See Barbara Bush*, 38 ECAB 710 (1987); *John A. Snowberger*, 34 ECAB 1262 (1983); *Rocco Izzo*, 5 ECAB 161 (1952).

The Board wishes to further note that the selection of Dr. Belle as the impartial medical specialist was improper as he was not appointed by the Office to act as an impartial medical specialist in accordance with procedures established by the Office for the selection of such specialists.

A physician selected by the Office to serve as an impartial specialist should be one wholly free to make a completely independent evaluation and judgment.[4] In order to achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. These procedures are set forth in the FECA Procedure Manual [5] as follows:

> "*Medical referee examination.* This type of examination is required in cases where there is a conflict of medical opinion. In contacting specialists, the MA [medical adviser] or OMA [Office medical adviser] will follow a rotation system. The services of all available and qualified Board-certified specialists will be used insofar as practicable to eliminate any possible inference of bias or partiality. This can be accomplished by selecting specialists in alphabetical order as listed in the Directory of Medical Specialists under the specialty and/or subspecialty heading in the appropriate geographic area, and repeating the process when the list is exhausted. Physicians in full-time employment with federal agencies, and physicians previously connected with the claim will not be used as medical referees. On rare occasions a noncertified specialist may be used because of his/her unusual qualifications in the particular field. This decision will be made by the MA and the reasons for his/her selection should be well-documented.
>
> "An appropriate notation should be made in the Directory when a specialist indicates his/her unwillingness to accept a case or when, for other valid reasons (other than a previous

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[4] *See Leonard W. Waggoner*, 37 ECAB 676 (1986); *George W. Coast*, 36 ECAB 600 (1985); *Raymond E. Heathcock*, 32 ECAB 2004 (1981); *Paul J. Rini*, 13 ECAB 557 (1962). *See also* 20 C.F.R. section 10.408.

[5] Federal (FECA) Procedure Manual, Chapter 3-400.3(a), *Examinations, Treatment, and Related Services*, Part 3—Medical. *See also Leonard W. Waggoner, supra* note 4.

> connection with the claim under consideration) it is not advisable or practicable to use his/her services. If there is reason to consider a specialist's views or opinions to be reasonably predictable because of his/her writings and/or reputation in the specialty, or otherwise, that specialist will not be selected. This determination will be made by the MA or higher OWCP authority. Upon the specific request of the employee or his attorney, or when otherwise indicated because of highly controversial issues, the MA or the OMA will prepare a list of three or more certified specialists for submission to the employee or his/her attorney, permitting the employee to participate in the selection. When a specialist from a minority group is specifically requested, every effort should be made to insure that such a candidate is included in the list. The request by the employee or the attorney must give specific, definitive reason as to why the selected physician should not have been chosen to perform an examination. Vague or general reasons, such as personal preference, will not be acceptable. In those areas where the choice of a specialist is limited, a list need not be furnished."

In the instant case, the record shows that Dr. Belle was selected as the impartial medical specialist based on the recommendation of the second Office medical adviser who stated: "Since there seems to be a conflict I would like to suggest the claimant be referred to Dr. Martin S. Belle, . . . for a final opinion. . . ." The Board notes that the Office procedures described above contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.[6] The Board finds that since Dr. Belle was not selected by rotation, this objective was not met as the Office medical adviser's selection gave the appearance of impropriety that the Office selected Dr. Belle because his opinion was favorable to it.

The Board further notes that the procedures also provide that the Office disqualify a physician from serving as an impartial medical specialist where there is reason to believe that the physician's views may be biased. Dr. Belle, however, was not subjected to this screening process contemplated by the Office procedures which also provide that the employee or his attorney may object to the Office's selection of an impartial medical specialist and that they may participate in the selection of a specialist upon request.[7] However, appellant was examined by Dr. Belle without any prior notice and therefore he was not given any meaningful opportunity to object to Dr. Belle's use as an impartial medical specialist. At oral argument held before the Board on June 16, 1988, appellant's attorney objected to the selection of Dr. Belle as the impartial medical specialist contending that he was not fully apprised of the factors of employment to which appellant attributed his heart condition, especially the criminal investigation, and also questioned the doctor's impartiality in that he reported that the stress appellant experienced was not employment related vis-a-vis appellant's attending physicians' opinion that it was. Because appellant was not afforded the opportunity to participate in the selection of the impartial medical specialist and because Dr. Belle was not selected in accordance with the Office's procedures, the Board finds that to permit the use of Dr. Belle's medical opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists even assuming the doctor was initially provided with a proper statement of accepted facts; therefore, Dr. Belle cannot be considered to be an impartial medical specialist in this case and his report may not receive any weight.[8]

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[6] *Leonard W. Waggoner, supra* note 4.

[7] *Id.*

Accordingly, the case is remanded to the Office for preparation of a new statement of accepted facts indicating which factors are to be considered by the impartial medical expert in resolving whether appellant's heart condition is employment related. The Office should then refer appellant, together with the statement of accepted facts and the case record, to a specialist in the appropriate field of medicine selected in accordance with the Office's procedures. The specialist should be requested to evaluate appellant and issue a complete and rationalized medical opinion to resolve the conflict in this case. Following this and such further development as the Office deems necessary, a *de novo* decision shall be issued.

The decision of the Office of Workers' Compensation Programs, dated January 16, 1987, finalized January 20, 1987, is hereby set aside; the case is remanded for further proceedings consistent with this decision of the Board.

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[8] *Id. See also Leonard Lothlen*, 37 ECAB 314 (1986).

In the Matter of Maxine Leonard, claiming as widow of Ardee Leonard *and* Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii

Docket No. 88-1009; Submitted on the Record;
Issued August 5, 1988

Before George E. Rivers, Michele von Kelsch,
Willie T.C. Thomas

The issue is whether appellant's claim is barred by the applicable time limitation provision of the Federal Employee's Compensation Act.

On August 4, 1981,[1] appellant, the deceased employee's widow, filed an Office of Workers' Compensation Programs Form CA-5, "Claim for Compensation by Widow," which was dated June 22, 1981. Appellant alleged in this claim that employee died of asbestos exposure, constrictive pericarditis, polyserositis, and probable auto immune disease, on July 22, 1980. The reverse of the claim form was completed by Dr. Thomas A. Raffin, Board-certified in pulmonary disease, on July 8, 1981. Dr. Raffin reported that employee had a 32-year history of employment asbestos exposure.[2] In explaining the cause of the employee's death, the doctor stated as follows:

> "[d]eath was due to increased production of IgA antibodies forming crystals in all organs and then multiple organ failure. There was progressive pulmonary failure and death was from a respiratory arrest."

In response to a question regarding the causal relationship of the employee's death to his employment, the doctor responded as follows:

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[1] The CA-5 form was mailed on July 27, 1981 by appellant's representative to employee's last federal employing establishment. The CA-5 form was received by the employing establishment on August 4, 1981. 20 C.F.R. section 10.108 provides that "An original death claim may be filed by delivering a completed Form CA-5 to the Office, or to any person designated by the Office to receive such claim. The claim thus was not deemed filed until August 4, 1981.

[2] The employee's federal employment terminated on August 22, 1944. The employee thereafter enlisted in the Merchant Marines from 1944 to 1945. From 1946 until 1976 the employee was self-employed sheet metal worker and air conditioning installer.

> "I do not know? The patient was exposed to 30 years of asbestos and it is possible that the very rare overproduction of IgA antibodies (not typical multiple myeloma) was due to this exposure. It certainly is not a reported complication of asbestos exposure.
>
> "I do not know if there is a causal relationship."

On August 4, 1981 appellant also submitted a discharge summary from the Stanford University Medical Center, pertaining to the employee's last hospitalization, the employee's autopsy report, death certificate, and various employment records. Dr. Daniel Kent, Board-certified in internal medicine, reported on July 22, 1980 that employee's final diagnoses were respiratory arrest, pulmonary failure, IgA gammopathy, idiopathic crystal deposition with fibrosis of all organs, hepatomegaly, polyserositis, pneumonitis, upper GI bleeding secondary to ulcer, severe malnutrition, and dysphagia. Dr. Kent also noted that employee had a 30-year history of asbestos exposure, but no pulmonary fibrosis or plaque on chest x-ray.

An autopsy was performed on July 23, 1980 and a report was completed on October 28, 1980 by Dr. Chan H. Lee, a Board-certified pathologist. Dr. Lee reported the employee's cause of death as constrictive pericarditis, polyserositis, due to probable autoimmune disease. The same cause of death was reported on employee's death certificate.

On August 4, 1981 appellant also submitted the employee's employment records which established that he had been employed as a helper machinist at the Mare Island Navy Yard, in California, from October 1, 1941 until February 7, 1942 and as a helper machinist at the U.S. Navy Yard, Pearl Harbor, from February 7, 1942 until August 22, 1944.

On September 26, 1981 appellant completed an Office "Federal Employees' Notice of Occupational Disease and Claim for Compensation" form alleging that the employee died of asbestos.[3] Appellant acknowledged on this claim form that she first became aware of the employee's disease on approximately December 16, 1976, and that she first realized the disease was caused or aggravated by the employee's employment "approximately six months prior to his death" when he was questioned by physicians at Stanford Medical Center concerning asbestos exposure. The reverse of the claim form was completed by an official at the Pearl Harbor Naval Shipyard on June 11, 1982. The employing establishment reported that the employee had stopped work on August 22, 1944 after 2½ years of federal civilian service, and that the date the employee first reported his condition to a supervisor was unknown.

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[3] 20 C.F.R. section 10.105(e) provides that if no claim is filed by an injured employee or by someone acting on the employee's behalf prior to his or her own death, the right to claim compensation for disability other than medical expenses ceases and does not survive.

On November 30, 1982, appellant wrote to the Office and advised that the employee had filed a claim prior to his death; [4] and he had experienced extensive exposure to asbestos during his federal employment at both Pearl Harbor and Mare Island.

By compensation order dated July 19, 1984, the Office denied appellant's claim finding that she had not met her burden of proof by submitting rationalized medical evidence supporting causal relationship between the employee's death and his federal employment.

On January 29, 1986 appellant's representative requested reconsideration of the July 19, 1984 compensation order, and submitted an October 3, 1985 report from Dr. Brian P. Dolan, Board-certified in internal medicine. Dr. Dolan summarized employee's medical records from May 24, 1976 and then concluded that the employee died of pulmonary insufficiency due to asbestotic lung disease, or pericarditis and polyserositis caused by an immune system abnormality, which was probably caused by asbestosis. Dr. Dolan concluded, "I feel that asbestosis was either the direct or indirect cause of death in Mr. Leonard and that in the absence of asbestosis, he would not likely have died as early as he did."

On February 18, 1986, the Office claims examiner advised appellant that further information was necessary to adjudicate the claim including evidence of the employee's asbestos exposure during his federal employment. The Office advised appellant that she could relate discussions she had with the employee regarding his asbestos exposure.

In response to the Office's request, on March 10, 1986 appellant wrote to the Office and advised that the employee had been referred to an attorney after his physicians referred to his illness as asbestosis. Appellant also advised that in March of 1980 employee experienced respiratory distress, following which his physicians questioned him about his work, and his exposure to asbestos. Appellant further stated that:

> "He used loose asbestos from large bags which he mixed with water as a packing material. This caused so much dust that he

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[4] There is no evidence in the record that the employee did in fact file a claim prior to his death, and on appeal appellant does not assert that an earlier filing did occur

> used a handkerchief to keep from breathing the dust (over his mouth and nose). At Pearl Harbor he coughed up blood at times as ventilation was poor. He also used asbestos as gasket and pipe fittings. No protective masks were used or were available at Mare Island or Pearl Harbor."

On June 16, 1986 the appellant's representative advised as follows:

> "[W]ith respect to Mr. Leonard's exposure history, he worked on board ships during which repairs were being made and he would handle the insulation products and be in the vicinity of other workers handling asbestos products. The asbestos containing dust given off by these products was inhaled by Mr. Leonard. It was the inhalation of this asbestos dust that caused his illness and ultimate death.
>
> "Since Mr. and Mrs. Leonard were not married until 1975, Mrs. Leonard does not have any knowledge as to his work history other than what is known about his work at the shipyards and the family business."

On June 9, 1987 appellant wrote to the Office and advised that the employee had met with an attorney at Stanford Hospital shortly before he died. Appellant also stated that the employee had been referred to a Workers' Compensation attorney after being informed that he had asbestosis.

On August 7, 1987 the Office claims examiner advised appellant's representative that employee's medical records had been received but that further information was required detailing all of the employee's asbestos exposure. The claims examiner also advised that the time limitation for appellant's claim was one year from the date of employee's death, however, the one year limitation could be waived if the claim was filed within five years and the Office found that the failure to timely file was due to circumstances beyond the control of the person claiming benefits, or the individual claiming benefits could show sufficient cause or reason in explanation of the failure to file, and material prejudice did not result to the interest of the United States.

On July 27, 1987 the appellant wrote to the Office and again advised that "Stanford Doctors had used the word asbestosis as his illness."

In a letter dated October 2, 1987 appellant's representative reported as follows:

> "Mr. Leonard's only exposure to asbestos while federally employed was while he was at Pearl Harbor and Mare Island. The rest of his exposure came while working as a merchant marine from 1944 to 1945 and as a self-employed sheet metal worker and air conditioning installer from 1946 until 1976.
>
> "This claim was originally filed based upon Mr. Leonard's exposure to asbestos. Mrs. Leonard did not become aware that there might be any connective cause until Dr. Dolan's report of October 3, 1985. Originally, there was no thought that Mr. Leonard's myeloma and related conditions were asbestos related. This connection was suspected at the time of the autopsy on July 23, 1980."

By compensation order dated January 5, 1988 the Office denied appellant's claim finding that the case was barred by the statutory limitations of 5 U.S.C. sections 8119 to 8122.

The Board finds that the Office properly denied the claim for failure to comply with the time limitation provisions of the Act.

Appellant's claim for benefits is based upon her assertion that her husband died as a result of an occupational disease sustained in the performance of duty. The statutory period for filing a claim in such a case begins to run when the surviving beneficiary is, or should have been, aware of the causal relationship between the employee's death and factors of his employment.[5]

The Board has previously clarified that if the employment which allegedly caused injury occurred prior to September 7, 1974, the effective date of statutory amendments, the one-year statute of limitations remains applicable.[6]

The Act requires in cases of injury prior to September 7, 1974 that a claim for compensation be filed within one year of the date claimant was aware or reasonably should have been aware that the condition may have been caused by the employment. The requirement may be waived if the claim is filed within five years and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure.[7] The test for whether sufficient cause or reason was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinarily prudent person would have exercised in protecting her rights under the same or similar circumstances.[8]

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[5] *Marie A. Demeri, (Carmine Demeri),* 32 ECAB 1184 (1981).

[6] *Dorothy L. Sidwell,* 36 ECAB 699 (1985).

[7] *Id.*

In this case appellant filed a claim on August 4, 1981 alleging that her husband's death on July 22, 1980 was due to asbestos exposure during his federal employment. The employee worked at federal Naval Yards from October 1, 1941 until August 22, 1944. The employee's federal asbestos exposure, and therefore his injury, occurred during the period October 1, 1941 until August 22, 1944. The applicable statute of limitations therefore is the one-year statute of limitations, in effect prior to September 7, 1974. Appellant's claim would therefore be compensable if it was filed within one year after she was aware or reasonably should have been aware that the employee's condition may have been caused by his federal employment.

Appellant's own admissions establish that she was aware as early as December 16, 1976 that the employee may have had asbestosis. Furthermore, appellant's own admissions clearly establish that at least by the time of the employee's death she had discussed his federal employment asbestos exposure with him; that she was aware that his doctors questioned whether his condition could have been caused by his employment; and that she was aware the employee in fact had contacted a workers' compensation attorney. The evidence thus establishes that by July 22, 1980 the appellant was aware or reasonably should have been aware that the employee's condition may have been caused by his federal employment.

Although the appellant alleges that the one-year requirement does not preclude her claim because Dr. Dolan's report of October 3, 1985 was the first instance of a medical opinion linking the death to asbestos exposure, the Board finds this argument to be without merit.

The Board has previously found that the statute of limitations begins to run on the date that appellant actually knows of the *possible relationship* between the employee's condition and his employment, or reasonably should have known of the *possible relationship*. The Board has never required that appellant have definitive evidence of causal relationship on the date a claim is filed.[9] Therefore in this case, although Dr. Dolan's report may have been helpful in establishing causal relationship, it did not establish the point in time at which appellant knew or reasonably should have known of the *possible relationship* between the employee's condition and his federal employment.

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[8] *Id.*

[9] *William A. West*, 36 ECAB 525 (1985).

The Board further finds that appellant has not provided sufficient cause to justify waiver of the one-year time limitation. Appellant's argument that she did not know of a causal relationship until Dr. Dolan's report of October 3, 1985 does not explain why the claim was filed on August 4, 1981 rather then prior to July 22, 1981.

The decision of the Office of Workers' Compensation Programs dated January 5, 1988 is hereby affirmed.

In the Matter of MICHAEL STOCKERT *and* U.S. POSTAL SERVICE, POST OFFICE, Short Hills, N.J.

Docket No. 88-945; Submitted on the Record;
Issued August 11, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing that his right inguinal hernia condition is causally related to a November 13, 1987 employment incident.

On November 13, 1987 appellant, then a 38-year-old postal carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on November 13, 1987 he sustained a lower right hernia as a result of lifting and carrying a tray of mail. The employing establishment indicated on the reverse of appellant's Form CA-1 that it was controverting appellant's claim and submitted statements from several supervisors on duty at the time of the alleged injury which indicate that appellant did not appear injured and did not report any injury to them until he returned from a week of annual leave. The employing establishment stated that they believed the Postal Service was not a contributor to the alleged injury.

In support of his claim appellant submitted a November 13, 1987 disability certificate from a physician with the Staten Island Medical Group [1] who diagnosed appellant's condition as "right inguinal hernia" and stated that appellant should perform "light work" only.

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[1] The Board notes that the name of the physician who examined appellant is not discernable from the record

By letter dated December 23, 1987 the Office of Workers' Compensation Programs requested that appellant submit medical evidence in support of his claim and a description of how the injury occurred. In support of his claim appellant submitted progress notes from Dr. Napolean Lapinid, a specialist in internal medicine, who examined appellant on November 14 and November 30, 1987. Dr. Lapinid diagnosed a right inguinal hernia and noted that appellant was to return "after authorization from comp."[2]

By compensation order dated February 5, 1988 the Office of Workers' Compensation Programs rejected appellant's claim finding that he failed to meet his burden of proof due to insufficient medical evidence.

The Board finds that appellant has failed to meet his burden of proof in establishing that his right inguinal hernia condition is causally related to a November 13, 1987 employment incident.

A person who claims benefits under the Federal Employee's Compensation Act[3] has the burden of establishing the essential elements of his claim[4] including the fact that he sustained an injury while in the performance of duty, and that he had disability as a result.[5] As part of his burden, he must present rationalized medical opinion evidence, based upon a complete factual and medical background, showing causal relationship.[6] The mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the condition became apparent during a period of employment, nor the belief of appellant that the condition was caused or aggravated by employment conditions, is sufficient to establish causal relation.[7]

None of the progress notes submitted by appellant in support of his claim contained any medical rationale supporting causal relation. A physician's opinion supporting causal relationship between a claimant's disability and a specific employment incident or factors of employment is not dispositive of the issue of causal relationship simply because it is rendered by a physician.[8] To be of probative value to an employee's claim, the physician must provide rationale for the opinion reached.[9] Where no such rationale is present, the medical opinion is of diminished probative value.[10]

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[2] The Board notes that appellant originally submitted these records on January 5, 1988 however the Office did not review them due to an apparent clerical error. Appellant resubmitted the records on January 22 and January 25, 1988 at the Office's request.

[3] 5 U.S.C. section 8101, *et seq.*

[4] *Margaret A. Donnelly*, 15 ECAB 40 (1963).

[5] *Daniel R. Hickman*, 34 ECAB 1220 (1983).

[6] *Id. See also William Nimitz, Jr.*, 30 ECAB 567 (1979).

[7] *Juanita C. Rogers*, 34 ECAB 544 (1983).

[8] *See James F. Clift*, 13 ECAB 221 (1961).

Appellant has failed to submit rationalized medical evidence supporting a causal relationship between his hernia condition and the alleged employment incident of November 13, 1987 and has, therefore, failed to discharge his burden of proof. The Board notes that, as an appellate body, it is precluded under its rules of procedure from reviewing any evidence which was not before the Office at the time of its final decision.[11]

The decision of the Office of Workers' Compensation Programs dated February 5, 1988 is hereby affirmed.

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[9] *See Norris Jones*, 7 ECAB 241 (1954).

[10] *James F. Clift*, note 8, *supra*.

[11] 20 C.F.R. section 501.2(*c*) provides: "The Board has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the Act. . . . The review of a case shall be limited to the evidence which was before the Office at the time of its final decision." For this reason, the Board cannot consider the undated report from Dr. Patel which appellant submitted after the Office had reached its final decision. Appellant may wish to submit this new evidence to the Office with a request for reconsideration.

In the Matter of HELEN M. GOLDEN *and* DEPARTMENT OF THE NAVY, NAVY RECRUITING DISTRICT, East Meadow, N. Y.

Docket No. 88-515; Submitted on the Record;
Issued August 12, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of $596.01 during the period April 28, 1984 to May 17, 1984; and (2) whether the Office properly determined that appellant was not without fault in the matter of the overpayment and that, therefore, the overpayment was not subject to waiver.

On June 13, 1983, appellant, a 54-year-old military personnel clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained an acute cervical disc condition as a result of factors of her federal employment. Appellant stated that she first became aware of this condition on April 25, 1983, and her Form CA-2 indicates that she stopped work on April 26, 1983.

The record indicates that appellant lost intermittent time from work following submission of her claim. She used sick leave from April 26, 1983 to May 4, 1983 and was on leave-without-pay from May 5, 1983 to September 2, 1983. Appellant returned to work on September 3, 1983 and worked through October 31, 1983 at which time she stopped and used sick leave from November 1, 1983 to December 22, 1983 and annual leave from December 23, 1983 to December 30, 1983. Appellant returned to work on January 2, 1984 and worked until April 11, 1984 at which time she stopped, used sick leave for April 12, 1984, was in a leave-without-pay status from April 13, 1984 to April 27, 1984, used annual leave from April 28, 1984 to May 17, 1984 and returned to a leave-without-pay status on which she remained until she ceased employment with the employing establishment. On May 9, 1984, appellant had requested compensation for the period "4/13/84 to present." On the compensation request form, in response to whether she had received "any pay for the requested period," appellant responded "no." The record indicates that, with the exception of her leave-without-pay period in 1983, appellant paid her health insurance premiums for all leave-without-pay periods. The record also indicates that on or about September 2, 1985, appellant ceased employment with the employing establishment and commenced employment with the U.S. Customs Bureau.

By compensation order dated September 30, 1983, the Office of Workers' Compensation Programs denied appellant's claim for compensation on the basis that the medical evidence submitted by appellant in support of her claim did not establish that her back condition was causally related to factors of her employment.

Appellant requested a hearing on her claim and also submitted additional medical evidence in support of her claim. The Office's Branch of Hearings and Review reviewed appellant's case record in connection with her request for a hearing and by compensation order dated April 16, 1984 the Office hearing representative, on behalf of the Director of the Office, vacated the September 30, 1983 decision and remanded the case to the Office for further development of the medical evidence. The Director noted that appellant had sustained an employment injury to her back on July 12, 1982 accepted as a "lumbar disc injury" and that the additional medical evidence submitted by appellant subsequent to the Office's September 30, 1983 decision was *prima facie* sufficient to meet her burden of proof and require further development of the medical evidence and issuance of a *de novo* decision.[1]

Upon remand of the case, the Office referred appellant, her case record, together with a statement of accepted facts to Dr. Ralph Hirschhorn, a Board-certified orthopedic surgeon, for examination and evaluation and an opinion on causal relationship. On the basis of Dr. Hirschhorn's report, the Office, by compensation order dated October 21, 1986, accepted appellant's April 25, 1983 occupational disease claim for "cervical and lumbar strain syndrome" but found that disability related to this condition ceased as of September 3, 1985.

Following issuance of this decision, the Office authorized payment of compensation to appellant in the gross amount of $936.58 for the period April 13, 1984 to May 14, 1984 and, after deducting health insurance premiums in the amount of $60.10, issued to appellant a check dated April 3, 1987 in the net amount of $876.48. The Office also authorized payment of compensation to appellant in the gross amount of $14,497.81 for the period May 18, 1984 to September 1, 1985 and, after deducting health insurance premiums in the amount of $761.33, issued to appellant a check dated April 17, 1987 in the net amount of $13,736.48.

The Office subsequently discovered that in issuing appellant the two compensation checks, it had paid her compensation for the period April 28, 1984 to May 17, 1984, a period in which appellant had used annual leave and received payment related thereto. The Office computed that it had overpaid appellant compensation in the amount of $596.01.

By letter dated April 21, 1987, the Office notified appellant that a preliminary determination had been made that she had received an overpayment of compensation in the amount of $596.01 because, for the period April 28, 1984 to May 17, 1984, she had received both payment for annual leave and payment of compensation for disability. The Office advised appellant that a preliminary finding had been made that she was at fault in the matter of the overpayment because she should have been aware that she was not entitled to compensation for disability for the same period in which she had already received pay for annual leave. The Office informed appellant that this was not a final decision and that she may request a prerecoupment hearing and she also had the right to submit any evidence to refute the amount of the overpayment, to refute that the overpayment occurred, or to refute the preliminary finding that she was at fault. The Office also advised appellant that it was beneficial for her to submit information concerning her income and expenses because, in the event it was determined that recovery of an overpayment was proper, the Office required information on appellant's ability to repay the debt. In this regard, the Office included with its April 21, 1987 letter an overpayment recovery questionnaire (Form OWCP-20).

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[1] The record indicates that subsequent to this decision appellant filed a recurrence of disability claim dated May 14, 1984 alleging a recurrence of back pain on April 11, 1984 causally related to her July 12, 1982 accepted employment injury. The record indicates that the Office combined this claim with appellant's April 25, 1983 occupational disease claim.

By letter dated May 5, 1987, appellant requested a reevaluation of the Office's finding of fault and a waiver of the overpayment. In support of her request, appellant stated that the two compensation checks issued to her constituted an underpayment of compensation because the Office had deducted, from such compensation checks, health benefit insurance premiums which appellant had paid for all periods in which she was in a leave-without-pay status. In support of this statement, appellant submitted a July 25, 1985 internal memorandum of the employing establishment acknowledging that appellant had paid such premiums for all leave-without-pay periods in 1984 and 1985. Appellant also submitted her leave and earning statements from the employing establishment evidencing payment of her health insurance premiums for the same periods in which the Office made such deductions from her compensation checks. Appellant also submitted a list of her checks, the date and amount of each check by which she paid the health insurance premiums.

Appellant further stated that the October 21, 1986 compensation order had accepted her April 25, 1983 occupational disease claim but she had not, as yet, received compensation for lost time from work in 1983 related to this claim, and, therefore she was due additional compensation. Appellant further stated that although she had used annual leave for the period April 28, 1984 to May 17, 1984 and received payment related thereto, she had not wanted to use annual leave for this period. Appellant stated that she requested to be placed on a leave-without-pay status for this period but was "forced" to use sick leave, which she did not have, by the employing establishment and which sick leave was converted to annual leave. Appellant stated that if she had intentionally requested annual or sick leave for this period, she would understand the necessity of repayment of the compensation for disability received for this period but that because she had been forced to use annual leave, she should be entitled to retain the $596.01 in compensation as remuneration for loss of her annual leave. Appellant also claimed reimbursement of medical expenses related to her accepted condition and submitted copies of the medical bills and of her personal checks evidencing payment of these bills.

The record indicates that following receipt of appellant's May 5, 1987 letter and the accompanying supporting documentation, the Office authorized reimbursement to appellant of the $761.33 it had deducted in health insurance premiums from her compensation check dated April 17, 1987 and issued to appellant a check dated July 24, 1987 for said amount. The Office also authorized payment of compensation to appellant in the gross amount of $3,703.76 for the period May 5, 1983 to September 2, 1983 and, after deducting health insurance premiums in the amount of $202.88 and the overpayment of compensation in the amount of $596.01, issued to appellant a check dated July 24, 1987 in the net amount of $2,904.87. The record indicates that appellant consented to deduction of the overpayment from her July 24, 1987 compensation check with the understanding that she was not waiving her right to dispute the finding of fault or to request a waiver of the overpayment.

By letter decision dated October 6, 1987 the Office found that appellant received an overpayment of compensation in the amount of $596.01 and that appellant was at fault in the matter of the overpayment because she received both compensation for disability and payment of annual leave monies for the period April 28, 1984 to May 17, 1984 and should have been aware that she was not entitled to dual payments in the form of salary and compensation for the same period. The Office noted in its decision that the overpayment had already been recovered from appellant's July 24, 1987 compensation check.

The Board finds that appellant received an overpayment of compensation for the period April 28, 1984 to May 17, 1984.

The record establishes, and appellant does not dispute, that she used annual leave and was paid for such leave for her absence from work during the period April 24, 1984 to May 17, 1984. The record also establishes, and appellant does not dispute, that she subsequently received compensation for disability for this same period of time. Section 8116 of the Federal Employees' Compensation Act [2] provides that an employee may not receive sick or annual leave pay and compensation for the same period.[3] Accordingly, since appellant received annual leave pay and compensation for the same period, she received an overpayment.

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[2] 5 U.S.C. section 8101, *et seq.*

[3] 5 U.S.C. section 8116.

With respect to the amount of the overpayment, the Board finds that further development of the record is necessary.

The Board notes that following the Office's April 21, 1987 preliminary decision of an overpayment, appellant submitted evidence showing that additional monies were due her, thereby indicating that an underpayment, and not an overpayment, of compensation had occurred in her case. Appellant submitted evidence showing that she had paid health insurance premiums for the same period for which such deductions were made from her April 3, and April 17, 1987 compensation checks. Appellant also claimed that she had not been compensated for her lost time from work in 1983.

The Board notes that prior to issuance of its October 6, 1987 final decision on the overpayment, the Office reimbursed appellant for the health insurance premiums deducted from her April 17, 1987 compensation check. The Office also compensated appellant for her lost time from work in 1983. However, the record does not indicate whether the Office reimbursed appellant for the health insurance premiums in the amount of $60.10 deducted from her April 3, 1987 compensation check covering the period April 13, 1984 to May 14, 1984 and appellant has submitted leave and earnings statement indicating that health insurance premiums had already been paid for this period. Therefore, given this evidence, the Office should make a *de novo* determination of the amount of the overpayment.[4]

The Board finds that appellant was not "without fault" with respect to the overpayment which occurred as a result of appellant's acceptance of compensation for a period in which she had already received pay for annual leave.

Section 8129(a) of the Act [5] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."[6] No waiver of overpayment, however, is possible if the claimant is not without fault in helping to create the overpayment.

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[4] The Board notes that on appeal, appellant submitted her leave and earnings statement for 1983 which indicates that her health insurance premiums were paid for this year and, therefore, she may be entitled to a reimbursement of the health insurance premiums deducted from her July 24, 1987 compensation check which covered her 1983 disability period. However, the Board cannot render a decision on this issue because copies of the 1983 statements are not contained in the case record. Under the Board's Rules of Procedure (20 C.F.R. section 501), the Board's review of a case is limited to the evidence in the case record which was before the Office at the time of its final decision. *See* 20 C.F.R. section 501.2(c). Appellant should therefore submit this evidence to the Office for its review and consideration.

[5] 5 U.S.C. section 8129(a).

In determining whether an individual is not without fault or, alternatively, "with fault" section 10.320 of the Code of Federal Regulations states in relevant part:

> "An individual is with fault in the creation of an overpayment who:
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> > '(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
> >
> > '(2) Failed to furnish information which the individual knew or should have known to be material; or
> >
> > '(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.' "[7]

In the present case, it is apparent that the Office applied the third standard in finding appellant to be at fault in creating the overpayment.

Appellant contends that she should not be found at fault because she wanted to be on a leave-without-pay status during the period April 28, 1984 to May 17, 1984 and did not want to use her annual leave but was forced to use sick leave, which she did not have, by the employing establishment and which sick leave was subsequently converted to annual leave. Appellant claims that she should be allowed to retain the overpayment as remuneration for loss of her annual leave and for the long delay she endured waiting to be compensated for her disability.

Appellant's allegations with respect to the employing establishment forcing her to use sick leave, subsequently converted to annual leave, are not matters over which either the Board or the Office of Workers' Compensation Programs has jurisdiction. These are matters which come within the jurisdiction of the Office of Personnel Management (OPM) and, therefore, appellant should address these arguments to this agency. Although, as appellant points out, the Act specifies that an employee may use annual or sick leave at the time his or her disability begins,[8] this choice is subject to the availability of such leave to the employee and any regulations promulgated by OPM regarding the use of sick or annual leave by a federal employee.

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[6] 5 U.S.C. section 8129(b).

[7] 20 C.F.R. section 10.320(b) (revised April 1, 1987).

[8] *See* 5 U.S.C. section 8118(c).

The function of the Office of Workers' Compensation Programs is to determine, based on an employee's claim and supporting evidence, whether an employee is entitled to compensation benefits for employment-related disability. The Board's function is to review, upon request of a claimant, whether the Office processed his claim in accordance with the Act and its regulations.

In appellant's case, the Office, in its October 21, 1986 compensation order, found that appellant was entitled to compensation for employment-related disability and paid appellant for her periods of lost time from work from April 26, 1983 to September 2, 1985 for which she had not been compensated in some other manner. The Office, however, mistakenly paid appellant compensation for disability for April 28, 1984 to May 17, 1984, a period for which she had already received annual leave monies.[9] Appellant has not raised any arguments which are persuasive on the issue that she was not at fault in the matter of the overpayment and, should be granted a waiver. The fact that appellant experienced a delay before receiving compensation for disability or believes she was wronged by the employing establishment is not relevant to the issue of fault.

The Board finds that the facts of this case establish that appellant knew or should have known that she was not entitled to both annual leave pay and compensation for disability for the period April 24, 1984 to May 17, 1984 and, therefore, she was not without fault in the matter of the overpayment and the overpayment must be recovered.

The October 6, 1987 decision of the Office of Workers' Compensation Programs is remanded for a *de novo* decision on the amount of the overpayment of compensation but is affirmed in all other respects.

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[9] The Board has held that although the Office may have been negligent in issuing a claimant a compensation check to which he was not entitled, this does not excuse the claimant from accepting such check to which he knew or should have been expected to know he was not entitled. *Robert W. O'Brien*, 36 ECAB 541 (1985).

In the Matter of KENNETH E. MILLER *and* DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, N.H.

Docket No. 88-482; Submitted on the Record;
Issued August 16, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of $16,631.27 during the period July 7, 1977 to June 22, 1978; (2) whether the Office abused its discretion by refusing to waive recovery of the overpayment; (3) whether the Office properly denied appellant's request for a prerecoupment hearing made more than 30 days after the Office's preliminary overpayment decision; and (4) whether the Office properly denied appellant's request for a hearing made after issuance of the final overpayment decision.

On August 17, 1977, appellant, then a 58-year-old production controller, filed an occupational disease claim alleging that his hypertension and angina were causally related to stressful factors of his federal employment. The record indicates that appellant stopped work on July 6, 1977 and retired from the employing establishment on June 22, 1978. Based on the factual and medical evidence submitted in connection with appellant's claim, the Office of Workers' Compensation Programs, by letter dated February 28, 1980, accepted that appellant had sustained a temporary aggravation of his preexisting compulsive personality disorder as a result of factors of his federal employment but found that such aggravation ceased on June 22, 1978, the date appellant retired. The Office authorized payment to appellant of compensation for temporary total disability in the net amount of $16,631.27 for his lost time from work from July 7, 1977 to June 22, 1978.

Appellant requested a hearing on the Office's decision alleging that his employment-related disability continued beyond June 22, 1978. A hearing was held on June 16, 1981 and in a decision dated and finalized on November 24, 1981 the Office hearing representative affirmed the decision of the Office finding that the medical evidence of record did not establish employment-related disability beyond June 22, 1978.

On February 17, 1982, appellant filed an application for review with the Board. The Director of the Office subsequently filed with the Board a motion to remand appellant's case on the grounds that the Office had never issued a formal decision on appellant's original claim alleging employment aggravation of his hypertension and angina and that, with respect to temporary aggravation of appellant's preexisting obsessive compulsive personality disorder by employment factors, the Director found that there was no rationalized medical opinion of record to support a determination that such aggravation ceased as of June 22, 1978. The Director requested that appellant's case be remanded to the Office for further development of the evidence with respect to these matters and issuance of a *de novo* decision. By decision dated June 16, 1982, the Board granted the Director's motion to remand.

Upon remand of the case, the Office referred appellant for examination and evaluation by Dr. Philip Sullivan, a Board-certified psychiatrist, Dr. Ronald S. Rosenfeld, a Board-certified cardiologist, and a multidisciplinary medical panel at St. Elizabeth's Hospital of Boston consisting of Dr. David H. Weinberg, a Board-certified neurologist of professorial rank, Dr. Ellen Lathi, a Board-certified neurologist of professorial rank, and Dr. Andrew Fichera, a Board-certified psychiatrist of professorial rank. The foregoing physicians, in their respective reports, found that aggravation of appellant's underlying personality disorder by factors of his employment ceased by June 22, 1978 and that his hypertension and angina were not causally related to factors of his employment.

By compensation order dated August 6, 1986, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim for compensation on the basis that the weight of the medical evidence established that appellant's hypertension and angina are not causally related to factors of his federal employment and that aggravation of his underlying personality disorder did not continue beyond June 22, 1978.

By letter dated August 6, 1986, the Office notified appellant that its records indicated that appellant received both a civil service retirement annuity and compensation for temporary total disability for the period July 7, 1977 through June 22, 1978. The Office informed appellant that he was statutorily prohibited from receiving dual benefits for the same period and that he must therefore make an election as to which benefits he wished to retain for the period in question. The Office requested that appellant submit his election of benefits within 30 days from the date of the letter.

In response to the Office's August 6, 1986 letter, appellant, by letter dated August 21, 1986, advised the Office that he believed he was not obligated to return one of the two forms of compensation received during the period July 7, 1977 to June 22, 1978 on the grounds that: he was not responsible for the improper payment of dual benefits; he had informed the Office by letter dated June 23, 1980 that he had received both a civil service annuity and disability compensation for the period in question; the Office delayed in paying him disability compensation on his August 17, 1977 claim; and the Office had delayed for seven years before requesting reimbursement of one of the two forms of benefits paid. Appellant did not make an election of benefits.

By letter dated December 12, 1986, the Office notified appellant that a preliminary determination had been made that an overpayment of compensation in the amount of $16,631.27 had occurred in his case because he was inadvertently paid both a civil service annuity and compensation for disability for the same period, July 7, 1977 to June 22, 1978, and that payment of dual benefits for the same period is statutorily prohibited. The Office also stated that a preliminary finding had been made that he was without fault in the matter of the overpayment. The Office advised appellant that if he disagreed with the amount of the overpayment or that the overpayment had occurred, he had the right to submit new evidence in support of his contention. The Office also advised appellant that if he believed a waiver of the overpayment was appropriate in his case, he may request a waiver and that he also had the right to request a prerecoupment hearing but that such request must be made within 30 days from the date of the letter.

The Office also advised appellant that the Federal Employees' Compensation Act [1] provides that the Office may not recover an overpayment from a claimant who is found to be without fault if it is shown that recovery would defeat the purpose of the Act or would be against equity and good conscience. The Office informed appellant that the purpose of the Act is to provide at least a subsistence of income for beneficiaries and that, therefore, information concerning his income and expenses was important for the determination of whether waiver of the overpayment was appropriate in his case. In this regard, the Office included with its December 12, 1986 letter an overpayment recovery questionnaire (Form OWCP-20). The Office also clarified that the responsibility for establishing that waiver of the overpayment is warranted rests with appellant.

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[1] 5 U.S.C. section 8101, *et seq.*

The Office concluded its letter stating that a response from appellant was due 30 days from the date of the letter or a final decision would be made based on the evidence of record.

By letter dated January 15, 1987, received by the Office on January 20, 1987, appellant requested a hearing.

By decision dated March 27, 1987, the Office denied appellant's request for a prerecoupment hearing because his request was not timely filed. The Office advised appellant that its procedures, found in Chapter 2-901 of the Federal (FECA) Procedure Manual, allow a claimant no more than 30 days from the date of issuance of a preliminary overpayment decision to request a prerecoupment hearing and that appellant's hearing request dated January 15, 1987 was filed more than 30 days after the Office's December 12, 1986 preliminary decision. The Office advised appellant that he may submit any evidence relevant to the matter of the overpayment directly to the Office for its consideration or he may appeal the denial of his hearing request to the Board. The record indicates that appellant did not respond to this decision.

By letter decision dated June 25, 1987, the Office found that an overpayment of compensation in the amount of $16,631.27 occurred in appellant's case because appellant was inadvertently paid both a civil service annuity and disability compensation for the period July 7, 1977 to June 22, 1978 [2] in violation of statutory prohibitions. The Office further found that appellant had not submitted evidence indicating any error in the Office's preliminary determination that an overpayment occurred or any evidence justifying waiver of recovery of the overpayment and therefore, determined that appellant's case did not warrant waiver of the overpayment and requested that appellant make full repayment of the overpayment within 30 days from the date of the decision.

By letter dated July 17, 1987, appellant, through his authorized counsel, requested a hearing in the matter of the overpayment.

By decision dated November 5, 1987, the Office denied appellant's request for a hearing on the basis that applicable regulations provide that a claimant is not entitled to a hearing or reconsideration by the Office following a final overpayment decision. The Office advised appellant that his sole remaining appellate remedy is review by the Board.

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[2] The Board notes that in both its December 12, 1986 preliminary decision and its June 25, 1987 final decision, the Office incorrectly referred to the period in which appellant received an overpayment of compensation as July 7, 1977 to June 28, 1987. The actual period in which appellant received an overpayment of compensation is July 7, 1977 to June 22, 1978 as set forth in the Office's letter to appellant dated August 6, 1986. The Board also notes that the amount of the overpayment, $16,631.27, was correctly set forth in both the preliminary and final decisions.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of $16,631.27.

By letter dated February 28, 1980, the Office accepted that factors of appellant's employment temporarily aggravated his underlying obsessive compulsive personality disorder and authorized payment to appellant of compensation for temporary total disability in the net amount of $16,631.27 for his lost time from work from July 7, 1977 to June 22, 1978. The Office subsequently discovered that for this period appellant had also received a civil service retirement annuity and, noting that both the Civil Service Retirement Act [3] and the Federal Employees' Compensation Act [4] prohibit payment to a federal employee of dual benefits covering the same period,[5] determined that an overpayment of compensation had occurred in appellant's case.

With respect to the Federal Employees' Compensation Act, section 8116(a) of the Act provides:

> "While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay or remuneration of any type from the United States except—
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> > '(1) in return for service actually performed;
> >
> > '(2) pension for service in the Army, Navy or Air Force;
> >
> > '(3) other benefits administered by the Veterans Administration unless such benefits are payable for the same injury or the same death; and
> >
> > '(4) retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services subject to the reduction of such pay in accordance with section 5532(b) of the Title 5, United States Code.'
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> "However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another retirement system for employees of the Government does not impair the

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[3] 5 U.S.C. section 8301, *et seq.*

[4] 5 U.S.C. section 8101, *et seq.*

[5] 5 U.S.C. section 8337(f) and 5 U.S.C. section 8116(a).

> right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title."[6]

Appellant contends on appeal that there has not been any overpayment in compensation. However, in a letter dated August 21, 1986, appellant, through his authorized counsel, acknowledged receipt of both a civil service annuity and disability compensation for the period July 7, 1977 to June 22, 1978 and he has not submitted any evidence establishing that the circumstances of his case constitute one of the exceptions set forth in 5 U.S.C. section 8116(a).[7]

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b):

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." [8]

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under 5 U.S.C. section 8129(b), section 10.322(a) of Title 20 of the Code of Federal Regulations provides as follows:

> "(a) General. Recovery of an overpayment will defeat the purpose of the Act if recovery would would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

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[6] 5 U.S.C. section 8116(a).

[7] On appeal, appellant indicates that there is not an overpayment of compensation in his case because, as he alleges, his employment-related disability continued beyond June 22, 1978 and therefore he is entitled to additional compensation. The Board does not have jurisdiction to review the Office's decision of August 6, 1986 which denied appellant compensation on the basis that the weight of the medical evidence established that he did not have any employment-related disability beyond June 22, 1978. The Board's jurisdiction is limited to review of final decisions of the Office within one year from the date a claimant files an appeal. *See* 20 C.F.R. section 501.3(d)(2).

[8] 5 U.S.C. section 8129(b).

> "(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and
>
> "(2) The individual's assets do not exceed the resource base of $3,000 for an individual or $5,000 for an individual with a spouse or one dependent plus $600 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment in paragraph (d) of this section. The first $3,000 or more depending on the number of the claimant's dependents is also exempted from recoupment." [9]

In *Robert E. Wenholz*,[10] the Board found that the guidelines for recovery of an overpayment from an individual who is without fault, as set forth in section 10.322(a) (1) and (2),[11] were meant to be read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income [12] to meet his current ordinary and necessary living expenses [13] and also that his assets,[14] those which are not exempted, do not exceed a resource base of $3,000 (or, alternatively, $5,000 with a spouse or with one dependent, plus $600 for each additional dependent).

In the instant case, the Office in furnishing appellant with its preliminary overpayment decision also furnished appellant with an overpayment recovery questionnaire (Form OWCP-20) which solicited information on appellant's financial situation in order that the Office could determine whether waiver of recovery of the overpayment was appropriate in appellant's case. Appellant requested a waiver of the overpayment and, on appeal, has alleged that he is financially unable to repay the overpayment but has submitted no evidence to the Office establishing his financial inability to repay the overpayment. Although appellant was found to be without fault in the matter of the overpayment, he nevertheless bears the responsibility of providing the requisite financial information to support the granting of a waiver. In this regard, section 10.324 of Title 20 of the Code of Federal Regulations provides as follows:

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[9] 20 C.F.R. section 10.322(a).

[10] 38 ECAB 311 (1986).

[11] Prior to April 1, 1987, these guidelines were set forth only in Chapter 2-901.4(b)(1) of the Federal (FECA) Procedure Manual. On April 1, 1987, sections 10.320 through 10.324 pertaining to overpayments were added to the Office's regulations as set forth in Title 20, Part 10 of the Code of Federal Regulations and became effective June 1, 1987.

[12] "Income" is defined in 20 C.F.R. section 10.322(b).

[13] "Ordinary and necessary living expenses" are defined in 20 C.F.R. section 10.322(c).

[14] "Assets" are defined in 20 C.F.R. section 10.322(d).

> "In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information described in section 10.322, as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in denial of waiver, and no further requests for waiver shall be entertained until such time as the requested information is furnished." [15]

Therefore, given appellant's failure to submit to the Office the requisite information pertaining to his financial situation, the Office's determination that refusal to waive the overpayment would not "defeat the purpose of the Act" was not improper.

To determine whether recovery of the overpayment is against equity and good conscience, the second test under 5 U.S.C. section 8129(b), section 10.322 of Title 20 of the Code of Federal Regulations provides in part as follows:

> "(b) Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered. To establish that a valuable right has been relinquished, it must be shown that the right was in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss. An example of such 'detrimental reliance' would be a decision to enroll in college based on the award of benefits. The funds have been spent and cannot be recovered nor can the purchase be liquidated." [16]

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[15] 20 C.F.R. section 10.324.

[16] 20 C.F.R. section 10.323.

Appellant has not alleged, and the evidence of record does establish, that in reliance upon the overpayment, he relinquished a valuable right or changed his position for the worse. Therefore, the Office did not abuse its discretion by refusing to waive recovery of the overpayment under the second test of 5 U.S.C. section 8129(b).

The fact that appellant experienced a delay in receiving compensation for his disability or that the Office was responsible for creation of the overpayment or that the Office did not discover, and request reimbursement of, the overpayment until six years after the fact, does not constitute grounds for justifying waiver of the overpayment. The criteria by which waiver of an overpayment is determined is set forth in sections 10.322(a) and 10.323 of Title 20 of the Code of Federal Regulations. Based on the financial information of record, or lack thereof, and following the guidelines for recovery of any overpayment as set forth in the Code of Federal Regulations, the Office properly determined that waiver of recovery of the overpayment was not warranted in appellant's case and that appellant was capable of making full and immediate repayment of the overpayment.

The Board further finds that the Office properly denied appellant's request for a prerecoupment hearing made more than 30 days after the Office's preliminary overpayment decision.

On June 22, 1979, the Supreme Court in *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, construed the provisions of Section 204 of the Social Security Act, 42 U.S.C. section 204, which are substantially identical to section 8129 of the Federal Employees' Compensation Act and held, *inter alia*, that: (1) The statute requires that a prerecoupment waiver decision be made and that that decision like the one concerning fact of overpayment be accurate; and (2) An opportunity for a prerecoupment oral hearing is required whenever the overpaid individual requests waiver. Pursuant to this decision, the Office, on October 20, 1980, issued FECA Bulletin 80-35 detailing revised procedures to be followed by the Office in handling overpayment of compensation cases.[17] These procedures provide, among other things, that when an appellant is found to be without fault in the creation of an overpayment he or she is to be given 30 days from the date of issuance of the preliminary decision within which to request a prerecoupment hearing.[18]

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[17] The revised procedures contained in Bulletin 80-35 were incorporated in the Federal (FECA) Procedure Manual in July 1981. *See* Chapter 2-901, Overpayments, paragraph 2. On April 1, 1987, these procedures were incorporated in 20 C.F.R. section 10.321(c) and became effective June 1, 1987.

[18] *See supra* note 17.

Appellant's request for a prerecoupment hearing was dated January 15, 1987 and was received by the Office on June 20, 1987, more than 30 days after December 12, 1986, the date of the preliminary overpayment decision. The regulations are unequivocal in setting forth the limitation on requests for hearings. Appellant, therefore, does not have a right to a hearing as his request was not made within the requisite 30-day period imposed by the regulations promulgated under section 8129(a) of the Act,[19] and the Office, by its March 27, 1987 decision, did not abuse its discretion in denying appellant's request for a prerecoupment hearing. In this decision, the Office advised appellant that he could submit evidence on the matter of the overpayment directly to the Office. The record indicates that the Office delayed issuance of its final overpayment decision for almost 90 days but appellant did not submit any evidence.

The Board further finds that the Office properly denied appellant's request for a hearing made after issuance of the final overpayment decision.

Section 10.321(h) of Title 20 of the Code of Federal Regulations clearly establishes that the only appellate remedy available to a claimant after a final overpayment decision has been issued is appeal to the Board. This section states as follows:

> "If additional written evidence is not submitted, or a hearing requested, within the 30-day period [after issuance of the preliminary overpayment decision], the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The final decision concerning an overpayment, whether rendered subsequent to a prerecoupment hearing or in the absence of the submission of additional written evidence, is not subject to the hearing provision of 5 U.S.C. section 8124(b) nor the reconsideration provision of 5 U.S.C. section 8128(a). An individual aggrieved or adversely affected by a decision concerning an overpayment may request review by the Employees' Compensation Appeals Board." [20]

The Board notes from the record that the Office, in issuing its June 25, 1987 final overpayment decision, inadvertently attached appeal rights, specifically the right to a hearing and reconsideration, not available to a claimant once a final overpayment decision has been issued. The fact that the Office incorrectly advised appellant of appeal rights not available to him following issuance of a final overpayment decision does not vest these rights in appellant which are prohibited by regulations. Accordingly, in view of the limitation on appeal rights set forth in section 10.321(h) of Title 20 of the Code of Federal Regulations, the Office properly denied appellant's request for a hearing made after issuance of the final overpayment decision.

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[19] 5 U.S.C. section 8129(a). *See also* 5 U.S.C. section 8149 which vests with the Secretary of Labor the authority to prescribe rules and regulations necessary for the administration and enforcement including rules and regulations for the conduct of hearings.

[20] 20 C.F.R. section 10.321(h).

The decisions of the Office of Workers' Compensation Programs dated March 27, 1987, June 25, 1987 and November 5, 1987 are hereby affirmed.

In the Matter of HENRY C. DOLAN *and* DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, N.H.

Docket No. 88-512; Submitted on the Record;
Issued August 17, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of an overpayment of compensation in the amount of $481.50 and that therefore the overpayment was not subject to waiver.

On May 20, 1964 appellant, then a 34-year-old rigger helper, filed a claim for traumatic injury to his back sustained on May 18, 1964 while attempting to remove an article from a crane load. On June 3, 1966 the Office of Workers' Compensation Programs accepted appellant's claim for "aggravation of chronic lumbosacral strain condition, preexistent." On March 14, 1967 the Office accepted that appellant sustained a recurrence of disability on February 2, 1967 causally related to the original employment injury. The Office commenced paying appellant appropriate compensation benefits. Effective June 22, 1978 appellant received compensation based upon a loss of wage-earning capacity.

By letter dated February 12, 1987 appellant informed the Office that he had retired from his federal employment as of February 1, 1987. Appellant stated that he had several on-going medical problems and decided to take a regular civil service retirement. He noted that he intended to seek less stressful employment to augment his pension. However, the Office nevertheless sent appellant a check in the amount of $481.50 for payment of compensation benefits covering the period February 1, 1987 to March 14, 1987.

By letter to the Office of Personnel Management (OPM) the Office indicated that appellant elected to receive benefits provided by the U. S. Civil Service Retirement Act in lieu of compensation benefits and directed OPM to commence monthly annuity payments and forward a check in the amount of $481.50 as reimbursement for compensation paid from February 1, 1987 (effective date of election) through March 14, 1987 (date compensation was terminated).

By letter dated August 14, 1987 the Office made a preliminary determination that there had been an overpayment in the amount of $481.50 in appellant's case due to receipt of compensation benefits covering the period through March 14, 1987 "even though your OPM benefits began on February 1, 1987." The Office made a preliminary finding that appellant was at fault in the creation of the overpayment since he was aware that he could not receive benefits from OPM and the Office at the same time.

By letter dated August 17, 1987, with enclosed supporting documentation appellant demonstrated to the Office that the amount of $481.50 had been withheld from his civil service retirement benefits to recover the overpayment in his case. Appellant denied the allegation that he was to blame for the overpayment in benefits.

By letter to appellant dated August 26, 1987 the Office indicated that it would be contacting OPM to recover the overpayment in appellant's case.

By letter decision dated September 15, 1987 the Office found that appellant was at fault in the creation of an overpayment in the amount of $481.50 and directed that the overpayment be recovered from OPM, which had already deducted it from appellant's benefits.

The Board finds that the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of an overpayment of compensation in the amount of $481.50 and that therefore the overpayment was not subject to waiver and had to be recovered.

The Federal Employees' Compensation Act, 5 U.S.C. section 8129(b) states that "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment.[1]

20 C.F.R. section 10.320, of the regulation provides:

> "In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who:
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> > '(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
> >
> > '(2) Failed to furnish information which the individual knew or should have known to be material; or
> >
> > '(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.' "

In the present case, the Office applied the third standard—acceptance of a payment which the payee either knew or should have been expected to know was incorrect—in finding appellant at fault in creating the overpayment.

In the present case appellant stated in a February 12, 1987 letter that he had retired from his federal employment effective February 1, 1987 and elected to receive civil service retirement benefits. Appellant thereby acknowledged by this letter that he was no longer entitled to FECA benefits as of February 1, 1987. Once appellant made this election he knew or should have known that acceptance of compensation benefits for periods after February 1, 1987 was incorrect. As appellant accepted compensation benefits from the Office which covered the period February 1, 1987 to March 14, 1987, appellant was not "without fault" in the creation of the overpayment.[2]

The September 15, 1987 decision by the Office of Workers' Compensation Programs is hereby affirmed.

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[1] *Mary Valentine (Carl F. Valentine)*, 33 ECAB 1419 (1982).

[2] The Board notes that the overpayment has previously been collected by OPM and the Office has requested reimbursement of such proceeds.

In the Matter of GARNETT J. RODGERS *and* DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 88-805; Submitted on the Record;
Issued August 18, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has any disability or permanent impairment of the lungs due to an asbestos-related condition sustained in the performance of his federal employment.

On January 7, 1985 appellant, then a 54-year-old former preservation inspector, filed a notice of occupational disease and claim for compensation alleging that he sustained pleural thickening as a result of asbestos exposure during the course of his federal employment. Appellant stated that he first became aware of his condition on March 29, 1984. In an attachment appellant noted a history of civilian federal employment from 1968 to 1982.

By letters dated May 1, 1985, the Office of Workers' Compensation Programs requested that appellant and the employing establishment submit additional evidence to aid in the development of appellant's claim. Appellant was requested to submit medical evidence, including a physician's opinion as to the relationship between appellant's condition and his employment.

By compensation order dated September 13, 1985, the Office rejected appellant's claim on the ground that appellant did not meet his burden of proof by establishing the essential elements of his claim. An accompanying memorandum noted that appellant failed to respond to the May 1, 1985 Office request for additional evidence.

By letter dated October 3, 1985, appellant, through his attorney, requested reconsideration. A statement by appellant, a job description of appellant's last position with the employing establishment, and medical records from the employing establishment accompanied the request.

In his statement, appellant noted that he was first told that he had an asbestos-related condition by an employing establishment physician on March 29, 1984 when he failed to promptly recover from a cold. Appellant then detailed his asbestos exposure and employment history, noting that he served in the Navy from 1948 to

1967. He stated that he was exposed to asbestos as a damage control man in the Navy from 1952 to 1964 and that no protective equipment was used. From 1965 to 1967 he stated that he was exposed to asbestos while working as an instructor at a damage control training center. He stated that he continued to be unaware of any health risks associated with asbestos. He stated that he retired from the Navy in 1967 and began civilian federal employment with the employing establishment as a pipefitter from 1968 to 1976. Appellant contended that he was unaware of any asbestos-related health risks or the need to wear a mask and protective clothing. In July 1977 appellant took a preservation inspector position. He stated that this job required him to board ships daily to inspect asbestos and other types of insulation. In 1979 he was instructed to monitor airborne asbestos levels and, for the first time, realized the "danger of asbestos." It was also at this time that appellant stated he first began wearing masks and protective clothing. Appellant stated that he continued in this position "using all possible safeguards" until 1982 when he was replaced by nonfederal contractors.

The March 29, 1984 entry in the employing establishment health records noted appellant's treatment for "flu." A chest x-ray revealed "moderate pleural thickening" and was "suggestive of occupational lung disease." The employing establishment physician advised appellant to stop smoking to reduce the risk of complicating the lung condition shown on the chest x-ray.

After an Office medical adviser determined on December 10, 1985 that there was sufficient medical evidence to establish that appellant's condition was causally related to his civilian federal employment, the Office on December 17, 1985, referred appellant, together with a statement of accepted facts and the medical and factual record, to Dr. Eddy A. Bresnitz, a Board-certified internist to determine the cause and extent of any impairment.

In a February 28, 1986 report based upon a February 18, 1986 examination, and February 24, 1986 pulmonary function studies and x-rays, Dr. Bresnitz noted appellant's "extensive asbestos exposure" in his military and civilian employment. He then noted appellant's symptoms and history as follows:

> "[Appellant] currently complains of a cough with yellowish black sputum production on a daily basis for the last three years. This cough and sputum production are somewhat worse on arising in the morning, but they can occur throughout the day and night. In addition, he has had some shortness of

> breath on exertion when climbing up a hill or doing any other kind of activity. He also occasionally hears some wheezing in his chest, particularly during the night. These symptoms are exacerbated by changes in the weather, by work, and by odors. . . . He is currently a 10 cigarette per day smoker for the last two years. He has smoked an average of 20 cigarettes per day since the age of 16. Except for several episodes of bronchitis . . ., he has no history of other lung disease."

Upon his examination, Dr. Bresnitz stated in relevant part:

> "[Appellant] was an alert, well-developed male in no acute distress. . . . Examination of the head, ears, eyes, nose and throat was unremarkable. The chest exam showed symmetrical expansion bilaterally. There were no rales, rhonci, or wheezes. The heart sounds were normal and there was no S3, S4 heaves, thrills or murmurs. . . .
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> "Spirometry revealed a forced vital capacity (FVC) of 5.09 liters, 99 percent predicted; a forced expiratory volume in one second (FEV_1) of 3.29 liters, 90 percent predicted; and a FEV_1 to FVC ratio of 65 percent predicted. A bronchodialator study was not done. The diffusing capacity was 20.1 ml/min/torr, 61 percent predicted. The PFT's [pulmonary function tests] revealed a mild obstructive impairment with a moderate impairment in gas transfer. The chest x-ray revealed extensive bilateral pleural thickening without evidence of interstitial opacities. The thickening was greater than 10 min in width and involved one-fourth to one-half of the posterolateral pleura bilaterally."
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> * * *
>
> "Based on my examination and review of the patient's x-rays and pulmonary function tests, it is my opinion that [appellant] has evidence of pleural thickening caused by exposure to asbestos while working for the U. S. Navy. In addition, his pulmonary function tests reveal a mild obstructive pattern of respiratory impairment that is compatible with a diagnosis of chronic obstructive lung disease, most likely related to his smoking. He has an approximate 10 percent impairment. Bronchodilator studies are suggested to assess the reversibility of his obstruction.
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> "I have advised [appellant] to discontinue smoking altogether and to avoid further exposure to friable asbestos or other

> noxious fumes or dusts that may exacerbate his symptoms and lead to further physiologic deterioration. He should be seen at regular intervals to reassess his pulmonary performance and to screen his chest x-ray for evidence of occult malignancy and progressive pleural and/or parenchymal disease."

In a March 7, 1986 report, an Office medical adviser determined that based on FVC and FEV_1 spirometry test results from Dr. Bresnitz's evaluation, appellant had a Class I nonratable impairment and that appellant's Class II impairment based on the FEV_1 to FVC ratio was due to appellant's chronic obstructive pulmonary disease that was secondary to cigarette smoking and not his asbestos exposure.

By compensation order dated April 31, 1986, the Office, on its own motion, vacated its September 13, 1985 order. An attached memorandum stated that based on Dr. Bresnitz's report and evidence submitted by appellant on his reconsideration request, the condition of "pleural thickening secondary to asbestos exposure" had been accepted. The memorandum also noted that appellant's condition was not currently disabling and that a separate compensation order denying disability and pulmonary impairment would also be issued.

By letter dated September 23, 1986, appellant, through his attorney, requested that his case be "reviewed once again and that a claim for disability under the loss of wage-earning capacity be approved." The letter contended that appellant's condition had worsened to the point that he could no longer work in his most recent position as a maintenance worker with the State of New Jersey. Accompanying the letter were medical reports from Dr. Michael C. Lafon, an obstetrician/gynecologist and appellant's treating physician, Dr. Hosanna Lien, a specialist in internal and occupational medicine for the State of New Jersey, and appellant's job description with the State of New Jersey.

Dr. Lien's May 27, 1986 report stated that appellant had been examined for a return to work on that date. The report noted appellant's history of asbestosis and stated that appellant presently had been experiencing lower left chest pain extending toward the subcostal area. After a computerized tomography scan and gastrointestinal workups, appellant was told that his pain "could be due to pleural reactions or thickening from the asbestosis on the left lower lung." Dr. Lien stated that on examination appellant complained of inability to "do much because he gets short-winded easily," and stated that appellant did not believe he could go back to work because his job required "considerable" physical activity. Dr. Lien then stated that appellant was informed that his private physician would have to specify any permanent work restrictions.

On May 28, 1986, Dr. Lafon submitted to appellant's employer a statement indicating that appellant was permanently disabled due to his "chronic permanent pulmonary fibrosis secondary to asbestosis." He described appellant's limitation as "any physical exertion," and listed "[b]ronchodialators" as his treatment.

In his September 12, 1987 narrative report, Dr. Lafon stated that he had seen appellant six times in the previous seven months for treatment of chronic respiratory problems, including chronic dyspnea on exertion, shortness of breath, intermittent wheezing, and a yellow-sputum producing cough. He noted appellant's exposure of "over 35 years" to asbestos and his history of smoking "an average of 20 cigarettes per day since the age of 16." Dr. Lafon stated that on appellant's last visit, June 24, 1986, a computed tomography scan revealed bilateral pleural thickening associated with a calcified plaque suggesting chronic changes due to asbestos exposure. He treated appellant with medication and a proventil inhaler. Dr. Lafon concluded that appellant's condition was caused by asbestos exposure during his military and civilian employment with the employing establishment and stated that pulmonary function studies revealed a "mild obstructive pattern of respiratory impairment that is compatible with a diagnosis of chronic obstructive lung disease, related to his smoking, [and] made worse by his asbestos exposure." Dr. Lafon stated that based on these "chronic changes and his clinical symptoms," he advised that appellant "no longer work in an exertional manner as was described in his previous job." He stated that appellant's "condition" had existed since May 1, 1986.

In a statement dated November 12, 1986, appellant stated that his federal civilian employment ended on February 11, 1983 as a result of a reduction-in-force. He stated that he began working as a maintenance worker for the State of New Jersey on April 11, 1983 and listed certain highway maintenance duties he was required to perform. He then noted aspects of his respiratory condition previously in the record and stated that he was no longer working because his employer had no light-duty work that he could perform.

By compensation order dated December 23, 1986, the Office rejected appellant's claim for compensation and a schedule award on the ground that appellant had no "functional pulmonary impairment or disability as a result of the accepted medical condition." An accompanying memorandum noted Dr. Bresnitz's February 28, 1986 report that related appellant's chronic obstructive lung disease to smoking and the concurrence by the Office medical adviser on this issue. The memorandum stated that Dr. Lafon offered no rationale to support his contention that appellant's chronic obstructive lung disease was "made worse" by asbestos exposure. The memorandum found the reports of Dr. Bresnitz and the Office medical adviser to be "well-reasoned" and the weight of the medical evidence. The memorandum did note that regular medical examinations would be authorized to monitor appellant's accepted condition of pleural thickening.

By letter dated April 13, 1987, appellant, through his attorney, requested reconsideration of the December 23, 1986 rejection of appellant's claim.[1] A March 11, 1987 report from Dr. Leonard Berkowitz, a Board-certified internist, and diagnostic test results accompanied the request.

Dr. Berkowitz's report, based upon a February 2, 1987 examination, noted appellant's history of cigarette smoking and asbestos exposure, and his recent history of respiratory complaints. He noted that appellant had not been exposed to asbestos since 1983. He also noted that appellant's family history was "noncontributory." On his examination, Dr. Berkowitz stated in relevant part:

> "Physical examination revealed a thin, fit-looking male. . . . Chest revealed bibasilar and axillary mild rales. . . . Heart revealed a regular rhythm without murmur, gallop or rub. . . .
>
> "Chest x-rays done . . . on February 6, 1987 revealed bilateral pleural thickening and plaque formation. In addition, some mild pencil line calcification was noted in the left hemidiaphragm. A mild increase in the interstitial markings is noted.
>
> "Extensive pulmonary function test[s] were performed . . . on February 6, 1987. These revealed some mild airflow obstruction. The lung volumes revealed some air trapping. The carbon monoxide diffusing capacity in spite of an excellent inspiratory effort was significantly reduced. This reduction was out of proportion to the amount of airflow obstruction demonstrated. The patient had a blood count done and was noted to have a normal hemoglobin of 16.2, so this did not contribute to the reduced diffusing capacity. The patient then underwent an ear oximetry pulmonary stress test. This demonstated a four percentage point drop in his hemoglobin saturation with oxygen. This is positive for exercise desaturation.

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[1] In a January 7, 1987 letter, appellant requested reconsideration of the December 23, 1986 claim rejection. However, appellant submitted no new evidence with this request and the Office, on April 8, 1987, issued a compensation order denying appellant's application for review.

> "In summary, [appellant] has had occupational exposure to asbestos dust. He has developed characteristic pleural changes related to this exposure. In addition, he has developed asbestosis of a mild degree. I base this upon his pulmonary function tests, his chest x-ray, and his physical examination. In addition, he has a significantly increased risk of developing lung cancer because of his cigarette smoking and his asbestos exposure. He also has an increased risk of developing malignant mesothelioma."

In a July 7, 1987 report, an Office medical adviser determined that based on FVC, FEV_1, and FEV_1 to FVC ratio spirometry testing performed for Dr. Berkowitz on February 6, 1987, appellant had a Class I nonratable impairment. The medical adviser also opined that appellant was not disabled from performing the duties of a preservation work inspector, appellant's last position at the employing establishment, since that position involved moderate, not heavy, exertion. The medical adviser also noted that Dr. Berkowitz did not mention that appellant had any impairment for employment.

By compensation order dated July 16, 1987, the Office denied modification of its December 23, 1986 decision after reviewing the case on the merits. The order stated that appellant had submitted insufficient evidence to warrant modification of the prior decision. An accompanying memorandum noted the Office medical adviser's July 7, 1987 report.

By letter dated October 12, 1987, appellant, through his attorney, requested reconsideration and submitted a letter from Dr. Berkowitz in support of the request.

In his September 18, 1987 letter, Dr. Berkowitz opined that the Office medical adviser who reviewed his earlier report had overlooked "very significant material." He stated that appellant's reduced diffusing capacity and the "significant" reduction in appellant's hemoglobin saturation with oxygen during exertion was suggestive of interstitial lung disease. Dr. Berkowitz contended that, based on the testing performed for him, appellant had interstitial fibrosis related to asbestos exposure. Dr. Berkowitz then stated in relevant part:

> "This asbestos [exposure] is the cause of both the reduced diffusing capacity and the decrease in the hemoglobin saturation with oxygen. There is a mention made that [appellant's] dysfunction might be related to his cigarette smoking. The two ab-

> normalities I have cited are very characteristic of interstitial lung disease, but would be highly uncharacteristic of the amount of airflow obstruction related to cigarette smoking that [appellant] demonstrates.
>
> "I believe based on the medical evidence that is currently available, that [appellant] has asbestosis. I believe he has disability related to this asbestosis."

By compensation order dated January 22, 1988, the Office denied modification of its July 16, 1987 decision after reviewing the case on the merits. The Office stated that the evidence submitted was insufficient to warrant modification of the prior decision. An accompanying memorandum noted that the evidence noted by Dr. Berkowitz in his September 18, 1987 letter were not elements that are considered in making schedule award calculations. The memorandum then noted that the "specific values" considered in determining percentages of permanent impairment contained in Dr. Bresnitz's February 18, 1986 evaluation and in Dr. Berkowitz's February 6, 1987 evaluation "were reviewed and found to fall within Class I, which rates a zero percent impairment." The memorandum concluded by noting that Dr. Berkowitz failed to discuss "the extent, degree or nature of [appellant's] disability," and whether appellant was disabled from the "moderate duties" of his former position with the employing establishment.

The Board finds that the case is not in posture for a decision because of a conflict in the medical evidence.

The American Medical Association's *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984) have been adopted by the Office and approved by the Board as an appropriate standard for evaluating schedule losses under the Federal Employees' Compensation Act.[2]

In determining the degree of respiratory impairment, the *Guides* provide for four classes of respiratory impairment based on spirometry test results of an employee compared to the predicted "normal" values for forced vital capacity (FVC), forced expiratory volume (FEV_1), and FEV_1/FVC ratio.[3]

On February 28, 1986, Dr. Bresnitz, an Office referral physician, reported on his evaluation of appellant. Pulmonary function values were obtained and Dr. Bresnitz concluded that appellant had pleural thickening caused by asbestos exposure and also that he had a mild obstructive pattern of respiratory impairment compatible with chronic obstructive lung disease. He stated the chronic obstructive lung disease was "most likely related to his smoking," and approximated that appellant had a 10 percent impairment. Dr. Bresnitz did not indicate whether he estimated appellant's impairment under the A.M.A. *Guides* nor did he provide any rationale explaining how and why he believed that appellant's chronic obstructive lung disease was related to smoking and why appellant's lengthy asbestos exposure was not a causal factor. An Office medical adviser concurred with Dr. Bresnitz and concluded that appellant's impairment was related to cigarette smoking. However, the Board has held that if at least part of appellant's Class II respiratory impairment was due an employment-related asbestos condition, the appellant is entitled to a schedule award for the entire amount of the pulmonary impairment.[4]

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[2] *See Aaron Crenshaw,* 35 ECAB 686 (1984).

[3] A.M.A. *Guides,* Table 1—Classes of Respiratory Impairment, p. 86.

In determining the degree of respiratory impairment, the A.M.A. *Guides* provide criteria for rating permanent impairment based on the severity of dyspnea and spirometry test results from physiologic testing of pulmonary function. In determining the impairment classification, the spirometry test results of an employee are compared to the predicted normal values for FVC, FEV_1 and FEV_1/FVC ratio for an adult of the same sex for each age-height combination.[5]

The pulmonary function studies performed by Dr. Bresnitz reveal that appellant has a Class II (10 to 25 percent) respiratory impairment under the A.M.A. *Guides*. A Class II respiratory impairment is assigned when at least one of the ventilatory function tests, FVC, FEV_1 or FEV_1/FVC ratio, fall below the 95 percent confidence interval but are greater than 60 percent of the predicated value for these three tests.[6]

While Dr. Bresnitz did not note whether appellant had dyspnea, he did note that appellant had shortness of breath upon exertion when climbing or "any other kind of activity." Appellant's ventilatory function tests revealed that for forced vital capacity (FVC) appellant's predicted normal for his sex, age and height was 4.77 liters, less the confidence interval of 1.115, equalling a predicted value of 3.655 liters.[7] Dr. Bresnitz's test results recorded actual FVC of 5.22 liters. Appellant's FVC capacity of 5.22 liters was therefore greater than the expected capacity of 3.665 liters for a man of his size and age. Appellant's FEV_1 predicted normal for his sex, age and height was 3.770 liters, less the confidence interval of .842,[8] equalling a 95 percent predicted value of 2.928 liters. According to Dr. Bresnitz's ventilatory function test results, appellant had a FEV_1 actual value of 3.64 liters. Appellant's actual FEV_1 value of 3.64 therefore also exceeded the 95 percent predicted value of 2.928 liters. Finally, in determining the value of the FEV_1/FVC ratio, the predicted normal of 78.95, less the confidence interval of 8.28 liters,[9] equalled a 95 percent predicted value of 70.67. Appellant's actual value of 69 liters provided by Dr. Bresnitz's results, was less than the expected 70.67 liters for a man of his size and age. The pulmonary function studies result in finding, pursuant to the A.M.A. *Guides*, of a Class II impairment with a 10-25 percent impairment rating.[10]

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[4] *See Ellis J. LaFon*, Docket No. 85-1052 (issued August 30, 1985).

[5] A.M.A. *Guides*, Table 2, p. 89; Table 4, p. 91; and Table 6, p. 93.

[6] A.M.A. *Guides*, p. 86.

[7] A.M.A. *Guides*, p. 89.

Dr. Berkowitz, a Board-certified internist, in his March 11, 1987 report based on examination, x-rays, and pulmonary function studies, determined that appellant developed "characteristic pleural changes" and mild asbestosis due to his occupational asbestos exposure. The pulmonary function studies performed for Dr. Berkowitz also indicated a Class II impairment.[11] In a September 18, 1987 report, Dr. Berkowitz disagreed that cigarette smoking was the likely cause of appellant's "dysfunction," contending that appellant's reduced diffusing capacity and his reduction in hemoglobin saturation with oxygen during exertion, both indicators of interstitial lung disease, "would be highly uncharacteristic of the amount of airflow obstruction related to cigarette smoking that [appellant] demonstrates." Dr. Berkowitz concluded that appellant had disability because of his asbestosis.

To resolve the conflict of medical opinion noted above, the Office should, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[12] refer appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist for a reasoned opinion on the nature of appellant's condition in light of his history of asbestos exposure and cigarette smoking. The specialist should be asked to measure appellant's height and also conduct further pulmonary function studies as the two studies contained in the case record do not correlate with regard to appellant's age and height. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

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[8] A.M.A. *Guides*, p. 91.

[9] A.M.A. *Guides*, p. 93.

[10] A.M.A. *Guides*, p. 86.

[11] In determining the value of the FEV_1/FVC ratio, the Office medical adviser correctly found, in accordance with the *Guides*, that appellant had a 95 percent predicted value of 70.3. However, Dr. Berkowitz's testing showed appellant's best actual value to be 70, not 70.35 as the medical adviser used in determining that appellant had a Class I impairment. Thus, since appellant's actual value of 70 liters was less than the predicted value of 70.3 liters, appellant also had a Class II impairment, according to the A.M.A. *Guides*, under this later testing.

[12] 5 U.S.C. section 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

The July 16, 1987, and January 22, 1988 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

In the Matter of Karen C. Schaffer *and* Department of the Navy, National Archives and Records Administration, Navy Personnel Record Center, St. Louis, Mo.

Docket No. 88-834; Submitted on the Record;
Issued August 18, 1988

Before David S. Gerson, Michele von Kelsch, Willie T.C. Thomas

The issue is whether appellant sustained a consequential injury on April 5, 1987 as a result of her January 31, 1986 employment injury.

On January 31, 1986 appellant, then a 35-year-old archives technician, filed a claim for traumatic injury to her left kneecap sustained on that date when she banged it against the inside corner of her desk. Appellant lost no time from work. On the date of injury appellant sought treatment at the employing establishment clinic which diagnosed a contusion and bruise of the left knee.

Appellant also sought treatment by Dr. Karen A. Grubaugh, a chiropractor, who submitted a form CA-16 medical report dated February 4, 1986.[1] Upon examination Dr. Grubaugh found limitation of motion and inability to move the left knee without extreme pain, and a marked limp. She diagnosed pulled medial knee ligaments, subluxation of fibula and resulting low back strain (aggravation of previous injury). Dr. Grubaugh checked the box marked "yes" relating appellant's condition to the employment incident and treated appellant by manual manipulation of the knee, fibula and low back. She stated that appellant had an "extreme reaction to a relatively minor condition—correction occurred rapidly" and returned appellant to her regular work.

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[1] Dr. Grubaugh had previously been treating appellant for a back condition.

On February 25, 1986 the Office of Workers' Compensation Programs accepted appellant's claim for a contusion to her left knee.

On April 7, 1987 appellant filed a claim for recurrent disability sustained on April 5, 1987 when she fell while walking on a public sidewalk. Appellant's supervisor noted that this incident did not occur while appellant was in the performance of duty. Appellant claimed disability beginning April 5, 1987.

In response to a letter by the Office requesting additional information regarding her recurrence claim appellant submitted a July 30, 1987 letter. Appellant indicated that she fell on April 5, 1987, due to a buckling of her left knee and injured her shoulders, neck, mid-back and right knee. She stated that she had sustained weekly episodes of pain in her left knee ever since the April 1987 employment injury. Appellant noted that she had no previous knee injuries before the employment injury.

Appellant also submitted a February 24, 1986 report by Dr. Anton C. Roedel, a chiropractor, regarding treatment of her back condition sustained on September 24, 1985 and November 7, 1985.

By letter decision dated August 25, 1987 the Office rejected appellant's claim for compensation finding that appellant failed to meet her burden of proof in establishing that her alleged recurrence of April 5, 1987 was causally related to her original January 31, 1986 employment injury.

The Office noted that no medical evidence was submitted in appellant's case, stating that chiropractors are not authorized to diagnose or treat knee conditions under the Federal Employees' Compensation Act.[2]

By letter dated September 10, 1987 appellant requested reconsideration of the Office's August 25, 1987 decision, submitting in support a September 18, 1987 report by Dr. Michael F. Burns, an orthopedic surgeon. Dr. Burns stated that he initially evaluated appellant on November 11, 1986 and noted that her initial complaint for left knee problems was in April 1987. Dr. Burns indicated that appellant related an original knee injury of January, 1986. He reported that appellant noted a "popping" sensation in her knee, followed by a giving way episode and subsequent locking. Dr. Burns stated:

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[2] *See* 20 C.F.R. section 8101(2).

> "Physical exam at that time revealed generalized tenderness of the knee in the peripatellar and joint line region. Patellar compression signs were noted as was a painful McMurray maneuver. It should be mentioned that physical exam was difficult due to generalized guarding of the knee. The patient was started on a course of physical therapy.
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> "X-ray examination of the left knee, April 6, 1987, was essentially negative.
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> "The patient was reexamined on April 20, at which point she was at least 75 percent better. She was not requiring any medication.
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> "The patient was last seen August 6, 1987 at which time she stated her left knee had been bothering her intermittently since May. It was difficult to localize the complaints and the patient mentioned she could not predict when the pain would occur. She was experiencing mild cracking and popping but no distinct locking. She denied any swelling. Physical exam revealed hypersensitivity in the anterior knee region, no specific patellar crepitus was noted, however, patellar palpation elicited extreme apprehension, guarding, and grimacing. The knee was grossly stable. The patient was instructed in an exercise program to include icing and a course of tapered aspirin.
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> "On August 20, 1987, this office received a telephone call from the patient stating she was doing better.
>
> "At the present time, it is my recommendation that the patient may continue her daily activities and maintain her lower extremity exercises as instructed. I do not feel that her knee problem will interfere with her ability to participate in her daily activities or function."

By letter decision dated November 10, 1987 the Office reviewed the case on its merits and denied modification of its prior decision finding that appellant had failed to meet her burden of proof in establishing a causal relationship between her left knee problems beginning April 5, 1987, and the injury of January 31, 1986.

By letter dated November 19, 1987 appellant requested reconsideration of the Office's decision, submitting in support a November 5, 1987 report by Dr. Burns. In his report Dr. Burns stated:

> "Karen Schaffer was recently seen in this office. She continues to complain of episodic knee pain, particularly along the region of the joint line. She denies any swelling or catching. She does have difficulty with climbing stairs. While she does experience

> pain, she is able to perform her daily activities and requires only occasional aspirin for pain relief.
>
> "In early September, 1987, the patient experienced a spontaneous knee pain which required her to step off a curb sustaining an inversion injury to her left foot and ankle region. Initial x-rays were negative. She continues to complain of an episodic ache along the medial and lateral aspects of the ankle with occasional stiff toes. She occasionally takes aspirin for these complaints.
>
> "As can be ascertained from the history, this soft-tissue injury to the foot and ankle is a result of her preexisting knee condition."

Appellant also submitted her medical file from the employing establishment which indicated that she had no knee condition prior to her federal employment.

By letter decision dated January 27, 1988 the Office reviewed the case on its merits and denied modification of its prior decision finding that the medical evidence submitted by appellant was not sufficient to warrant such modification.

The Board finds that appellant failed to establish that she sustained a consequential injury on April 5, 1987 as a result of her January 31, 1986 employment injury.

The basic rule respecting consequential injuries, as expressed by Larson, is that "when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct." [3] The subsequent injury "is compensable if it is the direct and natural result of a compensable primary injury." [4] In the present case, the question before the Board is whether the case record establishes that appellant's April 5, 1987 injury was the "direct and natural result" of the primary on-the-job traumatic injury and thereby constituted a consequential injury.

Appellant filed a claim alleging that a fall on a public sidewalk on April 5, 1987 was caused by her accepted employment injury of January 31, 1986. In support of her claim appellant submitted medical evidence by her treating chiropractors and two reports by Dr. Burns, an orthopedic surgeon.[5] Dr. Burns, in his September 18,

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[3] Larson, *Workmen's Compensation Law*, *see* note 13.00.

[4] *Id.*, section 13.11.

[5] The evidence submitted by appellant's chiropractors is not admissible medical evidence under the Act since chiropractors are not authorized to diagnose or treat knee conditions. *See* 5 U.S.C. section 8101(2).

1987 report, failed to provide a diagnosis of appellant's left knee condition nor does he provide any opinion on causal relationship. In his November 5, 1987 report Dr. Burns stated: "as can be ascertained from the history, this soft-tissue injury to the foot and ankle is a result of her preexisting knee condition." However, again, Dr. Burns failed to provide any rationale explaining how the April 5, 1987 incident was causally related to the January 31, 1986 employment injury, nor did he provide a diagnosis of the "preexisting condition." Dr. Burns also described a September 1987 incident of spontaneous knee pain which caused current problems with her left foot and ankle. Appellant has not established that her April 5, 1987 injury was the "direct and natural result" of her January 31, 1986 employment injury.

The decisions of the Office of Workers' Compensation Programs dated August 25, 1987, November 10, 1987 and January 19, 1988 are affirmed.

In the Matter of VICTORIANO P. CHAVEZ *and* DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, La Tuna, Tex.

Docket No. 88-628; Submitted on the Record;
Issued August 23, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his actual commissions earned from real estate sales; (2) whether the Office properly determined that there was an overpayment of compensation to appellant in the amount of $23,133.33 for the period April 1, 1981 through December 31, 1985; (3) whether the Office properly determined that appellant was not "without fault" in the creation of the overpayment, and that therefore the overpayment was not subject to waiver; and (4) whether the Office properly required repayment from appellant's continuing compensation at the rate of $400.00 per month.

On October 2, 1972 appellant, then a 44-year-old correctional counselor, filed a claim alleging lower back injury on October 1, 1972 when he slipped on some grease and fell against a cooker while walking through the employing establishment kitchen. On November 10, 1972 the Office of Workers' Compensation Programs accepted appellant's claim for low back strain.

On September 14, 1973 the employing establishment issued a CA-16 authorization for treatment for recurrence of lower back pain experienced by appellant, causally related to his October 1, 1972 employment injury.

On June 6, 1974 appellant filed a claim alleging back injury on June 5, 1974 when he slipped on the tile floor while walking in the main corridor at the employing establishment and landed on his left knee, jarring his back. Appellant stopped work that date. On August 27, 1975 the Office accepted appellant's claim for lumbar muscle spasm.

On September 26, 1977 appellant filed a claim alleging that he sustained a sprained lower back on September 12, 1977 when he lifted a movie projector at work. Appellant received continuation of pay from September 13 through October 27, 1977 and he received compensation for temporary total disability thereafter. On March 29, 1978 the Office accepted appellant's claim for chronic low back strain.

By CA-1049 dated April 7, 1978 appellant was advised that in order to avoid an overpayment of compensation he must notify the Office immediately when he returned to work and return to the Office any compensation received after he returned to work.

By CA-1032 dated November 21, 1978 the Office advised appellant of the requirement that he report all employment and rates of pay during the past 12 months or since his last statement. Appellant completed and returned the form on November 27, 1978, noting that he had no employment during that period.

On a work tolerance evaluation form dated July 9, 1979 Dr. Oren H. Ellis, an orthopedic surgeon, noted that appellant was able to work about four hours a day, occasionally lift up to 10 pounds, occasionally squat and kneel, and could probably be rehabilitated to do light duty provided that he could stand or sit at will and change position often. Dr. Ellis noted that maximum improvement had been reached and that appellant could not return to the job he held at the time of injury.

By letter dated September 25, 1979 the Office advised the employing establishment that rehabilitation through reemployment was desirable for appellant, and that Dr. Ellis had indicated that there were many work activities appellant could perform.

On November 28, 1979 appellant completed another CA-1032 indicating that he had no income for the preceding period.

By letter dated February 14, 1980 the employing establishment advised the Office that it was able to provide appellant with a position that accommodated his physical restrictions, and that Dr. Ellis had agreed appellant could probably perform satisfactorily in that role.

By letter dated March 10, 1980 the employing establishment provided appellant the option of returning to the employing establishment on a limited duty basis or choosing civil service retirement. By letter dated March 23, 1980 appellant declined the job offer stating that his working in such a hazardous position would be dangerous to all the establishment's employees. Appellant noted that he was trying to become a real estate salesman so that he could arrange his work hours to accommodate his physical condition.

By letter dated April 3, 1980 the Office advised Dr. Ellis that the offered employing establishment position was for an eight-hour day, and it requested that Dr. Ellis clarify whether appellant could work for eight hours.

By report dated July 28, 1980 Dr. Ellis replied that he did not believe appellant could work in the position offered for eight hours a day.

By letter dated October 17, 1980 the Office rehabilitation specialist advised the employing establishment that unless the job offered could be modified to involve only four hours a day it would not be considered valid because it did not meet appellant's medical limitations. By report dated November 20, 1980 Dr. Ellis advised the Office that appellant was still disqualified from his previous employment due to his condition.

By OWCP-3 Rehabilitation Status Report dated January 22, 1981 an Office rehabilitation specialist indicated that appellant's case was being closed because of an unrealistic plan, and he recommended computation of loss of wage-earning capacity.

By CA-1032 dated March 3, 1981 appellant indicated that he had been working as a real estate salesman on a commission basis since September 1980 but as yet had not earned anything.

In response to an Office letter dated April 29, 1981 inquiring about the hours and days of appellant's employment, David B. Martinez, appellant's employer, noted that appellant was a realtor associate performing real estate sales twice a week for four hours a day for a total of eight hours a week of employment, beginning September 1, 1980. David Martinez noted that appellant worked solely on a commission basis with no set salary, and was trying to learn the business. By letter dated March 10, 1981 the chairperson of the Realtor Institute indicated that appellant had passed a three-part real estate course leading to a real estate license.

By letter dated June 30, 1981 the Office advised appellant that although his efforts to rehabilitate himself by taking courses in real estate were commendable, the government was unable to support such a program because medical evidence indicated that he could not pursue full-time employment. The Office advised that it would consider computing loss of wage-earning capacity based on part-time work in appellant's area, and requested that appellant keep the Office advised as to his earnings in the real estate field.

On December 20, 1981 appellant completed a CA-1032 listing the periods he worked during 1981 and the commissions he received on his real estate sales. Appellant's total amount of commission for 1981 was $2,051.43.

On October 22, 1982 the Office calculated appellant's wage-earning capacity based on his actual earnings, and in a memorandum to the file that date a claims examiner noted that appellant's current wage-earning capacity was not enough to reduce his compensation significantly. The claims examiner noted that another CA-1032 was being sent and that appellant's wage-earning capacity would be reevaluated upon receipt of further information; the examiner also noted that further job offers would be explored if appellant was able to work eight hours a day.

On November 3, 1982 appellant completed another CA-1032 form listing his employment in real estate sales during 1982 as producing a total of $1,007.77 commissions. By report dated November 10, 1982 appellant's employer noted that appellant worked 20 hours a week as a real estate salesman and received commissions on his sales.

On August 11, 1983 the Office received a Social Security report for appellant's social security number showing that for the period January 1978 through December 1982 there were a total of $1,379.00 earnings reported under appellant's number. Dr. Ellis continued to periodically provide progress reports on appellant's condition from 1981 through 1984 noting that appellant continued to be disabled from his previous employment, that he had reached maximum improvement, and that he could work for 3-4 hours a day with restrictions on bending, squatting, climbing, kneeling, twisting, and on lifting more than 10 pounds.

On February 16, 1984 appellant completed a CA-1032 noting that he continued to work in real estate sales and that his total commissions for 1983 amounted to $5,181.75. Appellant also enclosed his business card, and copies of his 1982 federal and state income tax returns.

An Office report dated June 3, 1983 noted that appellant stated when interviewed that he worked about 20 hours a week, a large part of which was conducted on the phone from his home. Appellant claimed to make about two trips a week to the realty office for a few hours to get information.

On January 10, 1985 appellant completed a CA-1032 noting that he continued to work part-time in real estate sales as his health permitted, and he noted that he received $16,128.86 in commissions for the year 1984.

On January 8, 1986 appellant completed a CA-1032 noting that he continued to work part-time in real estate sales and noting that he earned a total amount of $2,425.00 during the year 1985.

By letter dated September 16, 1986 the Office requested that appellant submit his income tax returns for the years 1981, 1983, 1984 and 1985. Appellant submitted the requested tax returns and his farm depreciation schedules.

On January 7, 1987 appellant completed a CA-1032 noting that he continued to work part time as a real estate sales person and noted that he had no earnings during the year 1986.

By memorandum to the file dated January 7, 1987 an Office claims examiner noted that for the period April 1, 1981 through December 31, 1985 appellant earned $26,539.82 as reported on his forms CA-1032, and he opined that such earnings fairly and reasonably represented appellant's wage-earning capacity. The Office claims examiner noted that since compensation for temporary total disability was paid for that period, an overpayment would be determined and appellant's compensation would be changed to reflect his loss of wage-earning capacity. By a memorandum to the file dated January 8, 1987 the supervisory claims examiner noted that prior notification was not being given based on the Office interpretation of FECA Bulletin No. 86-65 because appellant's actual earnings were considered to be a return to work. The supervisory claims examiner also noted that appellant would have an overpayment but no forfeiture since he did report his earnings.

By letter dated March 5, 1987 the Office advised appellant that his loss of wage-earning capacity had been determined based on his ability to perform work as a realtor. The Office determined that, retroactive to April 1, 1981, appellant was able, as evidenced by the medically determined residuals of his injury documented by Dr. Ellis in his periodic reports provided between 1981 and 1984, to perform the job of realtor earning an hourly wage obtained by dividing appellant's actual earned commissions from part-time employment for the period April 1, 1981 through December 31, 1985 by a 40-hour work week hypothetically performed for the entire period. After making this determination of appellant's wage-earning capacity retroactive to appellant's first earned commissions, the Office determined that an overpayment in the amount of $23,133.33 existed because appellant received temporary total disability while he was receiving commissions for real estate sales; by memorandum to the file dated March 19, 1987 the claims examiner determined that appellant was not without fault in the creation of the overpayment because he was aware that he was not entitled to compensation for temporary total disability in light of his actual earnings. By letter dated March 20, 1987 the Office advised appellant that a preliminary determination had been made that there was a $23,133.33 overpayment, for which appellant was at fault because he continued to accept payments which he knew or should have known were incorrect.

By letter dated April 20, 1987 the Office advised appellant that attempts to rehabilitate him for reemployment would be initiated, and it advised him of his responsibilities.

By letter dated May 6, 1987 appellant requested a waiver of the overpayment and disagreed with the preliminary finding of fault.

By letter dated July 2, 1987 the Office advised appellant that regarding the overpayment he needed to submit documentation of his expenses including consecutive monthly bills, bank statements, proof of loan payments, and expenses.

By vocational rehabilitation report dated August 11, 1987 the rehabilitation counselor determined that appellant's present occupation as a real estate agent was the most feasible occupation for him; the case was thereafter closed.

Appellant submitted the requested bills and receipts and completed an OWCP-20 Overpayment Recovery Questionnaire noting that he had monthly income of $1,694.19 and monthly debts of $3,919.81. Appellant also listed $25,558.00 in assets which included $21,108.00 worth of stocks and bonds.

By decision dated September 10, 1987 the Office found that appellant was at fault in the creation of a $23,133.33 overpayment of compensation because he should have reasonably been aware that he was not entitled to compensation for temporary total disbility while earning income from self-employment. The Office directed that the overpayment would be recovered by withholding $400.00 from his continuing compensation benefits effective September 27, 1987.

The Board finds that the Office improperly determined appellant's wage-earning capacity based upon his actual commissions earned from real estate sales, thereby improperly determining the existence of an overpayment of compensation benefits in the amount of $23,133.33 for the period April 1, 1981 through December 31, 1985.

For the Office to make a proper determination of existence of an overpayment of compensation, the Office must determine whether a claimant received compensation to which he or she was not entitled under the Act.[1] In the present case the Office accepted appellant's claim for chronic low back strain in March 1978 and determined that appellant was entitled to temporary total disability for his lost wages. In July 1979 Dr. Ellis determined that appellant had reached maximum improvement but noted that he could not return to the job he held at the time of injury. Dr. Ellis indicated that appellant could work about four hours a day with occasional very light lifting and could probably be rehabilitated to do light duty provided he could sit or stand and change position at will.

The Board notes that when an injured employee is unable to return to the position held at the time of injury but is not totally disabled for all gainful employment, he or she is entitled to compensation for partial disability computed on loss of wage-earning capacity.[2] The Board further notes that in determining the compensation payable for partial disability, an employee's wage-earning capacity is determined by the employee's actual earnings if those earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual earnings, the employee's wage-earning capacity shall be determined by the Office by selection of a job after having given due regard to the nature and degree of the employee's physical impairment, the employee's age and qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect the employee's wage-earning capacity in his or her disabled condition. The salary of such a job shall then be considered the employee's wage-earning capacity, and his or her partial disability rate of compensation will be calculated.[3]

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[1] *See* 20 C.F.R. section 10.301, *et. seq.*

[2] 20 C.F.R. section 10.303(a); 5 U.S.C. section 8115(a).

[3] 20 C.F.R. section 10.303(b); *see also Albert C. Shadrick*, 5 ECAB 376 (1953).

The Board stated in *Raymond E. Romeo,*[4] that, once the Office has made a determination that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.[5] The Board finds that the Office failed to meet this burden and improperly determined appellant's loss of wage-earning capacity for the period April 1, 1981 through December 31, 1985.

Based on the July 1979 evaluation of appellant's limitations by Dr. Ellis, the Office pursued the possibility of reemployment of appellant with his former employing establishment, but was advised that such reemployment would entail an eight-hour work day and potentially hazardous situations, which Dr. Ellis did not believe was suitable for appellant and did not meet his medical limitations. Nothing further was done by the Office; no further rehabilitation efforts were made, and no loss of wage-earning capacity was calculated based on appellant's ability to perform part-time light duty in an appropriate position.

Appellant, on his own, decided to attempt rehabilitation by learning the real estate sales business. He began working in real estate sales part time for about eight hours a week on September 1, 1980 on a commission basis, however by CA-1032 report dated March 3, 1981 appellant indicated that he had not yet earned anything. The Office response by June 30, 1981 letter was to advise appellant that the government was unable to support such a program because medical evidence indicated that appellant could not pursue full-time employment. The Office also advised that it would consider computing loss of wage-earning capacity based on part-time work available in appellant's area, however, nothing further was done. No current medical evaluation of appellant's work limitation was obtained, and no Office determination of available appropriate part-time light duty jobs was made.

Appellant provided a December 1981 CA-1032 report on which he noted that during the year 1981 he had earned $2,051.43 in real estate sales commissions. In October 1982 the Office calculated appellant's wage-earning capacity based on appellant's total actual earnings reported in his December 1981 report for the period covered by that report.

The record does not indicate that the Office considered the factors explained in *Lee R. Chronister,*[6] in *Donald R. Shively,*[7] or in the Office's Program Memorandum No. 128 entitled "Determination of Wage-earning Capacity Where Wages are Based Solely on Commission," [8] which require consideration before the Office is permitted to consider an employee's earnings solely from commissions as fairly representing his wage-earning capacity. Nevertheless the Office, after calculating appellant's supposed wage-earning capacity based on what the Office considered were actual earnings that fairly and reasonably represented his wage-earning capacity, found that appellant's wage-earning capacity was not sufficient to reduce his compensation for temporary total disability. The Office advised appellant of that fact and requested that he keep the Office informed of his earnings; the Office noted that upon receipt of further information appellant's wage-earning capacity would be reevaluated, and noted that further employment opportunity would be explored if appellant was able to work eight hours a day. Nothing further was done by the Office.

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[4] 34 ECAB 1010 (1983).

[5] *See also Edward L. Havener,* 35 ECAB 268 (1983); *Ellen G. Trimmer,* 32 ECAB 1878 (1983).

[6] 32 ECAB 841 (1981).

[7] 22 ECAB 34 (1970).

Appellant continued to advise the Office of his earnings; he reported earnings based solely on commissions of $1,007.77 during 1982, $5,181.75 during 1983, $16,128.86 during 1984, $2,425.00 during 1985, and nothing during 1986 while working approximately 20 hours a week conducted in large part by phone from his home.

On January 7, 1987 the Office totalled all the commissions appellant had earned from the date he earned his first commission through the end of 1985, because appellant did not earn any commissions during 1986, and divided that amount by the number of weeks between April 1, 1981, the date of appellant's first earnings and December 31, 1985, the last week of a year in which appellant had earnings, to arrive at weekly "actual earnings" which the Office concluded fairly and reasonably represented appellant's wage-earning capacity. The Board again notes that the Office disregarded guidance provided in *Chronister*, *Shively*, and in FECA Program Memorandum No. 128 [9] in making this determination, and additionally disregarded periods during which appellant worked part-time without earning any commissions, such as that time preceding April 1, 1981 and, particularly the period the entire year of 1986. The Office also disregarded the irregular and part-time hours during which appellant was able to pursue real estate sales based on the state of exacerbation or remission of his disability in deciding that appellant's actual earnings fairly and reasonable represented his wage-earning capacity. Because of these deficiencies the Board finds that the Office improperly determined appellant's wage-earning capacity and improperly determined the existence and amount of overpayment of compensation allegedly paid appellant.

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[8] FECA Program Memorandum No. 128 states as follows:

Occasionally a wage-earning capacity rating is made on the basis of an occupation wherein earnings are based solely on commissions. In the case of *Donald R. Shively*, [22 ECAB 34 (1970)], the Board held that it was improper to use a position for which only a commission is paid, without making provision for payment of a higher rate of compensation during the beginning period in which a claimant would earn less than the amount used by the Bureau in the wage-earning capacity rating. "Where a wage earning capacity rating is to be made on the basis of commissions only, the claims examiner should obtain information as to the average number of weeks, or months it takes for a starting person to reach the level of commissions used as the basis of wage-earning capacity rating. Compensation should then be paid on the basis of the claimant's actual wage loss for that period of time. Thereafter, compensation should be paid on the wage-earning capacity rating which is predicated on the commission."

[9] *See supra*, notes 6, 7, and 8.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated March 5, 1987 and September 10, 1987 are hereby reversed.

In the Matter of ELIZABETH J. DAVIS-WRIGHT *and* U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Pendleton, Oreg.

Docket No. 88-774; Submitted on the Record;
Issued August 24, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's chiropractic treatment was unauthorized; and (2) whether the Office of Workers' Compensation Programs properly denied reimbursement of payment for chiropractic services.

On September 24, 1984 appellant, then a 38-year-old forestry aid, filed a claim alleging that on September 18, 1984 she fell while marking trees during her federal employment. Appellant alleged that she sustained blurred vision, left arm weakness, severe pain down the right leg, pain between her shoulder blades, low back pain and loss of balance as a result of the fall. On the reverse of the claim form appellant's supervisor noted that appellant had obtained medical care from Dr. Michael Martonick, Board-certified in internal medicine, on September 24, 1984 and that appellant had resigned her employment on September 25, 1984.[1]

In a letter dated September 26, 1984 appellant's supervisor, James L. Powell, stated that he had been informed on September 24, 1984 that appellant was terminating her employment because of the September 18, 1984 injury. Mr. Powell stated that he then decided to take appellant into town from the National Forest Campsite for medical examination; he drove to the campsite and drove appellant from the campsite to the Walla Walla Clinic for an appointment with Dr. Martonick.

On September 24, 1984 the employing establishment issued a CA-16 form authorizing appellant's medical care at the Walla Walla Clinic. On October 1, 1984 Dr. Martonick completed the CA-16 report, after his examination of appellant on September 24, 1984, and stated appellant's history of injury as "walking through the forest, tripped and fell," and noted a previous history of neck injury caused by whiplash. The doctor then noted that x-rays of the cervical spine and a CT scan were negative, diagnosed low back strain with neck strain, and stated that appellant would be disabled from September 24, 1984 until October 2, 1984.

Appellant returned to Dr. Martonick's office for treatment on September 25, 1984. Dr. Martonick noted on September 25, 1984 that appellant's back pain was improved, but that she still had some neck pain. The doctor also reported that he had recommended physical therapy for appellant, but that appellant had declined and had stated a preference to be treated by a chiropractor.

On October 24, 1984 Dr. Martonick completed a CA-17 form and stated that he could not comment on appellant's current ability to perform work activities because appellant had not returned for a follow-up examination.

On November 14, 1984 the Office advised appellant that the evidence she had submitted was not sufficient to establish that she sustained an injury while in the performance of duty on September 18, 1984. The Office requested that appellant provide a detailed attending physician's report explaining how the described employment injury contributed to all of the conditions for which she was claiming compensation.

By letter decision dated June 17, 1985, the Office rejected appellant's claim finding that she had not met her burden of proof to establish she sustained an injury in the performance of duty. On

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[1] In a resignation statement dated September 25, 1985 appellant noted that due to her lower back and neck injury she would not be able to perform her employment duties.

November 1, 1985 appellant requested reconsideration of her claim and submitted her own affidavit and a medical report from Dr. Floyd Turnbull, a chiropractor, dated August 1, 1985.

In his report Dr. Turnbull stated that appellant had been treated at the clinic in which he practices since September 27, 1984, and he had assumed her care on January 21, 1985. The doctor reported that appellant was initially treated by Dr. Dennis Banker, a chiropractor, who reviewed the x-rays taken by Dr. Martonick and then diagnosed cervical and lumbar sprain/strains, "with treatment to L4, L5, C2 and C5 (subluxation), as well as lumbosacral distortions." Dr. Turnbull further reported that after he assumed appellant's care she expressed complaints of headaches, with mental confusion, low back and right leg pain, and numbness and tingling in her arms. The doctor also noted that follow-up progress x-rays were taken of appellant's cervical and lumbar spine on March 7, 1985. According to Dr. Turnbull, the cervical x-rays showed marked straightening of the mid and lower cervical curve, major right lateral flexion at C2, right posterior body rotation, and right lateral flexion with left posterior body rotation at C5. The doctor also noted that there were multiple static intersegmental disrelations in the mid and upper thoracic spine, and that the lumbar x-rays showed a moderate right pelvic distortion and multiple static intersegmental disrelations. The doctor concluded by noting that his intensive treatment of appellant had ended on June 3, 1985 and she was currently being seen on an as needed basis.

In an affidavit dated August 12, 1985 appellant stated that on September 18, 1984 she was marking trees while carrying six quarts of paint and a sprayer in a backpack. Her feet became tangled in some branches and forest debris, and she fell forward landing on both knees. Appellant also noted that as both knees landed on the ground, the weight of the backpack snapped her head and neck causing extension and immediate pain and headache. In the affidavit appellant also described the initial selection of her physician as follows:

> "On the 24th of September, which was a Monday, at about 7:00 a.m. I called my supervisor in Walla Walla and indicated to him that I needed medical attention. The supervisor, Mr. Jim Powell, questioned that I was injured on the job and I informed him that I was in pain and I requested to see a chiropractor. He indicated that it was not possible to be examined by a chiropractor but that he would take me to a doctor in town.

> "That he took me to a Dr. Michael Martonick, M.D., who examined me. I requested that Dr. Martonick refer me to a chiropractor which he refused to do. I was still in great deal of pain. Mr. Powell took me back to the office in Walla Walla and indicated that they were going to assign me some office work at that time.
>
> "I then sought chiropractic care on my own and the treatment that I received has helped considerably in alleviating my condition."

On November 19, 1985 the Office advised appellant that her case had been reviewed on its merits and it had been determined that while she had submitted a portion of the evidence requested on November 14, 1984, she had not submitted all of the requested information. The decision dated June 17, 1985 was therefore being set aside and remanded for further development.

By letter dated December 23, 1985 the Office requested that appellant provide additional information including a narrative medical report from Dr. Turnbull explaining how her current medical problems were related to the injury of September 18, 1984.

On January 6, 1986 appellant submitted a second affidavit in which she realleged that on September 24, 1984 she was taken to Dr. Martonick, who was selected by Jim Powell, one of her supervisors.

By letter compensation order on August 29, 1986 the Office advised appellant that it had accepted her lumbar and cervical strain injury of September 18, 1984. Appellant was further advised to submit a CA-17 form for wage loss compensation and a well-rationalized medical report stating how the September 18, 1984 injury caused appellant's disability. On September 18, 1986 appellant submitted a form CA-17 in which she claimed wage loss from September 18, 1984 until June 3, 1985. The Office has not further developed appellant's wage loss claim.

On September 23, 1986 Dr. Turnbull reported that appellant's injury was caused by her work setting and was also the direct cause of her disability. The doctor also noted that appellant was able to perform regular work duties on June 3, 1985.

On January 14, 1987 Dr. Turnbull submitted a Form CA-20 in which he noted findings of marked restriction of cervical and lumbar ranges of motion and foraminal compression. The doctor also noted that x-rays showed marked straightening of mid and lower cervical curvature, with moderate pelvic distortion.

On April 7, 1987 an Office medical adviser reviewed the case record, restated Dr. Martonick's findings from the September 24, 1984 x-rays, and commented that Dr. Turnbull had not mentioned subluxations *per se* in his August 1, 1985 report. On April 9, 1987 the Office requested that appellant submit further evidence including all of the dates on which x-rays were performed, and the names of the physicians who performed the x-rays.

On August 18, 1987 Dr. Turnbull reported as follows:

> "From record, Elizabeth came to the Chiropractic Health Clinic on September 27, 1984 and was seen initially by Dennis Banker, D.C. During interview she reported that 'extensive x-rays and a CAT scan had just been performed as ordered by Dr. Martonick, M.D. and she brought these views for inspection.' Further views were not clinically justified or warranted. At that point Dr. Banker's conclusions were that of combined cervical and lumbar sprain/strains with treatment to L4, L5, C2 and C5 (subluxations), as well as lumbosacral distortions. From record, it appears Dr. Martonick evaluated the x-rays and CAT scan for fractures and pathology, not subluxations as is required of chiropractors.
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> "Dr. Banker was involved with Elizabeth's care up until the time he left our clinic in November of 1984. Further care was offered to Elizabeth as a continuation of services by this clinic progress x-rays for comparison were taken on March 21, 1985. Under the meaning of the Act, these services would be reimbursable and since all records did and do remain with the Chiropractic Health Clinic our continuation of care is valid as is our opinion."

On December 8, 1987 the Office by letter compensation order found that appellant was not entitled to reimbursement for payment of chiropractic expenses. The Office found that Dr. Turnbull began treating appellant prior to establishing a diagnosis of subluxation, that Dr. Martonick had not found abnormalities on the x-ray films he had taken, and that Dr. Turnbull's interpretation of x-rays taken by Dr. Martonick was not persuasive evidence of subluxation. The Office also found that appellant had not obtained prior approval for a change in medical management of her case from Dr. Martonick to Dr. Turnbull.

The Board finds that this case is not in posture for decision.

On September 18, 1984 appellant fell while marking trees at a National Forest and sustained injury to her cervical and lumbar spine. The Office accepted that appellant sustained lumbar and cervical strain on September 18, 1984. On September 24, 1984 she was taken by her supervisor to Dr. Martonick for medical treatment. Appellant returned to Dr. Martonick's office for treatment on September 25, 1984. On September 27, 1984 appellant sought chiropractic treatment at the Chiropractic Health Clinic, where appellant was initially treated by Dr. Banker and then by Dr. Turnbull.

The payment of medical expenses incident to securing medical care is provided for under section 8103 of the Act.[2] The pertinent provision provides that an employee "may initially select a physician to provide medical services, appliances, and supplies, in accordance with such regulations and instruction as the Secretary considers necessary. . . ."

Pursuant to that provision, 20 C.F.R. section 10.40(b) states:

> "An employee has only an initial choice of physicians. A change of physician will be permitted only upon approval of the Office after the employee submits an explanation for his or her desire to change."

The Office is required by 5 U.S.C. section 8103 to provide all medical care necessary on account of an employment injury. It is further provided that this care shall be furnished by or on the order of physicians designated or approved by the Office. Therefore, in the absence of an emergency, an employee may not recover for the cost of medical care obtained without prior approval.[3]

The record reflects that following the September 18, 1984 injury, appellant was driven by her supervisor to Dr. Martonick's office on September 24, 1984. Appellant returned to Dr. Martonick for treatment on September 25, 1984. Appellant chose to return to Dr. Martonick's office for treatment on September 25, 1984. Since appellant voluntarily returned to Dr. Martonick for treatment, Dr. Martonick constitutes appellant's initial choice of physician, pursuant to 5 U.S.C. section 8103.[4]

The Board notes however that section 8103 of the Federal Employees' Compensation Act does not restrict the Office's power to approve appropriate, necessary medical treatment obtained after the initial choice of physician and without prior authorization from the Office. The Office has broad discretionary authority in the administration of the Act and must in fact, exercise such discretion to achieve the objectives of section 8103.[5]

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[2] 5 U.S.C. section 8103, *see also* 20 C.F.R. section 10.401.

[3] *See Mildred A. Lindall*, 35 ECAB 287 (1983).

[4] *See Jose A. Perez, Jr.*, Docket No. 87-1738 (issued November 13, 1987).

In the instant case the Office's task was two fold; first to determine whether the services of Dr. Banker and Dr. Turnbull, both chiropractors, constituted medical treatment under the Act and if so whether such treatment was reasonable and necessary pursuant to the Act.

Section 8101(2) of the Federal Employees' Compensation Act[6] provides that chiropractors: "reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."

Appellant was initially examined by Dr. Martonick. Dr. Martonick reported that x-rays of appellant's cervical spine were negative, however diagnosed cervical and lumbar strain. Dr. Turnbull reported that appellant was treated on September 27, 1984 by Dr. Banker who reviewed the x-rays taken by Dr. Martonick and then diagnosed cervical and lumbar sprain/strains, "with treatment to L4, L5, C2 and C5 (subluxation), as well as lumbosacral distortions." Dr. Turnbull also reported that follow-up progress x-rays were taken of appellant's cervical and lumbar spine on March 7, 1985. Dr. Turnbull read these x-rays as revealing marked straightening of the mid and lower cervical curve, major right lateral flexion at C2, right posterior body rotation, and right lateral flexion with left posterior body rotation at C5. Dr. Turnbull also noted multiple static intersegmental disrelations in the mid and upper thoracic spine, moderate right pelvic distortion and multiple static intersegmental disrelations.

On April 7, 1987 an Office medical adviser reviewed the case record, restated Dr. Martonick's x-ray findings and noted that Dr. Turnbull had not mentioned subluxations *per se* in his report.

The Board notes that the proper definition of subluxation is provided in the Medicare Carriers Manual. The Manual defines "subluxation" as "an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrated on any x-ray film to individuals trained in the reading of x-rays."[7]

In this case, a conflict exists between the Office medical adviser's opinion that appellant's x-rays were normal and Dr. Turnbull's opinion that Dr. Banker had diagnosed subluxations prior to his

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[5] *Marjorie S. Geer*, 39 ECAB 1099 (1988).

[6] 5 U.S.C. section 8101(2).

[7] *Edward M. Kaers*, 35 ECAB 1191 (1984).

treatment, and Dr. Turnbull's own findings of intersegmental dislocations upon x-ray.

The Office shall refer the case record to a Board-certified radiologist to determine whether appellant has a spinal subluxation in accordance with the Medicare Carrier's Manual definition.

If following development of the medical record the Office finds that the chiropractor's services constituted medical treatment under the Act, the Office shall then determine whether such treatment was reasonable and necessary pursuant to the Act.

The December 8, 1987 decision of the Office of Workers' Compensation Programs is hereby set aside, and the case remanded to the Office for further development consistent with this opinion, to be followed by a *de novo* decision.

In the Matter of ROBERT GRAY *and* U.S. POSTAL SERVICE, POST OFFICE, Jackson, Miss.

Docket No. 88-950; Submitted on the Record;
Issued August 29, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant sustained an emotional condition in the performance of duty.

On September 3, 1986 appellant, then a 42-year-old mailhandler, filed a claim alleging that he sustained a "major affective disorder" and "cephalgia-complicated-vascular" condition which he related to factors of his federal employment. Appellant stopped work on December 3, 1985 after seeking treatment by a psychiatrist and was hospitalized. Appellant has not returned to work and was approved for disability retirement on March 28, 1986.

Appellant began work at the employing establishment in 1967 as a clerk. He later was assigned as a mailhandler but changed positions to that of letter carrier due to problems experienced with his back. In April of 1985 appellant filed discrimination charges requesting that he be off work, for religious purposes, from sundown Friday to sundown Saturday, as part of a Sabbath accommodation. This request was granted and became effective June 16, 1985. Appellant alleged that this Sabbath accommodation created much friction with his coworkers, that he was called a religious fanatic because of his beliefs and that he was harassed by his supervisors.

Appellant also alleged that he was being observed more closely both in and out of the office by the employing establishment. Appellant indicated that he was the only letter carrier off during the Sabbath and felt that he was envied, harassed and jealousy and hatred was exemplified by those around him. Appellant alleged that he developed severe headaches during this period.

In November 1985 appellant received a letter of warning for failure to report for work on a Saturday in October. The letter advised him that there had been a step 2 grievance. The effect of this letter of warning was to rescind appellant's Sabbath accommodations. Appellant denied that he was advised of any such proceedings and alleged that he never was provided with any official documents pertaining to any grievance. When appellant did not report to work on the following Saturday he was placed on AWOL and was advised of possible severe disciplinary action resulting in termination of employment. In order to protect his job appellant reached an agreement with the employing establishment which reassigned him to the position of mailhandler, a position which decreased his salary and lost his seniority status, and allowed him to resubmit his request for Sabbath accommodation. This reassignment also included a change in work shifts from working days to working the midnight shift. Appellant alleged that the physical and mental stress at work caused his emotional condition.

On December 3, 1985 appellant stopped work and sought treatment by Dr. Timothy Summers, a psychiatrist, who admitted appellant to the hospital due to the severity of his symptoms and failure to respond to outpatient history. Dr. Summers stated that appellant complained of depression, anxiety, difficulty sleeping, chest pain and decreased appetite. Dr. Summers stated the following history of present illness:

> "Mr. Gray reports that he was in good health until several weeks ago when he had a change in his job responsibilities as well as a change in the job shift. This change resulted in the patient being unable to fulfill his religious responsibilities and obligations creating anxiety for him. Additionally he reported feeling as though there was a conspiracy on his job to prevent him from being able to practice his religion which is different from that of most his coworkers. The patient reports that he has been experiencing a considerable amount of job stress since the change and has been having difficulty adjusting. Additionally Mr. Gray reports that his religious belief and practices have been extremely important to him and have been a

> way of life for him for the past seven to eight years. The patient was seen by me on an outpatient basis. However he did not respond to therapy. He is being admitted at this time because of the severity of his symptoms and failure to respond to outpatient therapy."

He reported his findings upon mental status examination and diagnosed appellant had sustained "major affective disorder. Consider anxiety disorder."

By report dated December 5, 1985 Dr. Summers provided the following history of present episode:

> "Informant [appellant's wife] stated that her husband had been undergoing job stress and has been exhibiting anger, inability to sleep, chest pains, rapid heart rate, migraine headaches and suspected mild seizures. He feels like his supervisors are conspiring against him to make him lose his seniority.
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> "Informant stated that the job stress began when patient asked to have his work time rescheduled so that he would not be working on his Sabbath which is sunset Friday to sunset Saturday. He has worked for the post office department 19 years and is a mailhandler. He was denied this request and he filed a grievance through the proper channels with the post office department and his union. For awhile he was given that day off and the post office department paid a substitute for that day. He was then approached and asked if he would like to be rescheduled for Monday through Friday instead of working Tuesday through Saturday. He agreed to this but the union filed another grievance on the behalf of another employee whose time off was changed because of the patient's request. The ruling was that it was discriminatory to allow him to be off work on his Sabbath and effective mid October he was to begin working his old schedule again. Informant stated that according to his religion once that you had your Sabbath time freed you could not revert back to working again. He did not report to work on that date and was written AWOL from work. He began to feel that there was a conspiracy against him because of this. She stated that the patient has been a very violent man at times in his life and although he is not violent at this time she is afraid that he will be if he is pushed too far.
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> "Information stated since about May or June patient has had severe migraine headaches. One time that she observed he had some kind of a 'black out' spell in which he stared into

> space for two or three minutes and did not appear to hear or recognize anyone. Informant stated that she thinks this has happened on other occasions but this is the only occasion that she observed for herself. She said a CAT scan was done at University Medical Center which did not show anything significant."

Appellant was discharged from the hospital on October 17, 1985. Dr. Summers stated in the discharge summary that upon admission to the hospital appellant stated that:

> "He was in good health until several weeks ago when he had a change in his job responsibilities; he had to change shifts and the resulting change made him unable to fulfill his religious responsibilities and obligations. This conflict created considerable anxiety, depression and fears of losing control."

Dr. Summers stated a discharge diagnosis of "major affective disorder. Cephalgia, vascular complicated."

By report dated February 3, 1986 Dr. Summers stated that appellant continues to be depressed, suspicious, irritable, and easily provoked, and remains unable to work. He estimated a date of February 3, 1987 that appellant would be fully recovered. By form CA-20 dated September 3, 1986 Dr. Summers checked a box indicating that he believed appellant's condition was caused or materially aggravated by the described employment activities.

By letter decision dated March 24, 1987 the Office rejected appellant's claim for compensation finding that appellant had failed to discharge his burden of proof in establishing that his emotional condition is causally related to factors of his federal employment.

By letter dated April 9, 1987 appellant requested a hearing before an Office hearing representative. The hearing was held on September 15, 1987.

In support of his claim appellant submitted a May 7, 1987 letter from Dr. Summers which stated:

> "It is my opinion that Mr. Robert Gray's cephalagia, major depression with paranoid ideations and homicidal thoughts were the direct result of job-related stress; particularly issues associated with his religion."

By hearing representative decision dated January 5, 1988, and finalized that same day, the Office affirmed its March 24, 1987 decision finding that appellant had not met his *prima facie* case. The hearing representative stated:

> "In the case presently under consideration, while there are some employment factors such as the EEO complaint, and the fact that the claimant may have been watched more closely, the focus of this claim is the claimant's distress over his work schedule. The claimant wishes to have Saturdays off for religious reasons. This is not a work factor.
>
> "All of the medical evidence of record supports that the claimant's emotional problems were due to the conflict over not having Saturdays off. The medical evidence does not discuss any specific factors of the claimant's employment."

The Board finds that appellant has not established his emotional condition was sustained in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1]

In support of his claim appellant submitted medical reports by Dr. Summers who found that appellant's emotional condition was due to the conflict between his responsibilities and his religious beliefs. He stated that the change in appellant's job responsibilities and work shift resulted in appellant's being unable to fulfill his religious responsibilities and obligations thereby creating anxiety. Dr. Summers opined that appellant's emotional condition was the direct result of job-related stress "particularly issues associated with religion."

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[1] *Lillian Cutler*, 28 ECAB 215 (1976).

The Board finds that the medical evidence of record establishes that appellant's emotional condition was due to symptoms caused by his distress over not being able to fulfill his religious responsibilities and obligations, which does not constitute a factor of employment. As appellant's disability due to an emotional condition was not sustained in the performance of duty, but instead was causally related to his religious beliefs, a factor not related to his federal employment, appellant is not entitled to compensation under the Federal Employees' Compensation Act.

The decisions of the Office of Workers' Compensation Programs dated March 24, 1987 and January 5, 1988 are hereby affirmed.

In the Matter of Lucius E. Pearson and U.S. Postal Service, Biscayne Facility, Miami, Fla.

Docket No. 88-960; Submitted on the Record;
Issued August 24, 1988

Before David S. Gerson, Michele von Kelsch, Willie T.C. Thomas

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof in establishing that the position of cashier II fairly and reasonably represents appellant's wage-earning capacity effective February 25, 1982.

On June 7, 1966, appellant, then a 42-year-old maintenance labor foreman, sustained an injury to his back while in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for back strain, paid him compensation for temporary total disability from June 8, 1966 to June 27, 1966 and noted that appellant had a concurrent nonemployment-related condition of osteoarthritis of the lumbar spine.

On April 4, 1975, appellant filed an occupational disease claim alleging that he developed varicose veins in both legs due to the constant standing and walking required for his job and claimed compensation commencing March 17, 1975, the date he stopped work. The Office accepted appellant's claim for varicose veins, paid him compensation for temporary total disability commencing March 17, 1975 and placed him on the automatic compensation rolls effective December 11, 1975.[1]

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[1] The record indicates that appellant also sustained an injury to his back on October 9, 1953 but the record does not indicate whether this injury was accepted as employment related by the Office.

On May 21, 1981, the Office referred appellant to Dr. Henry H. Bryant, a Board-certified surgeon, for examination and evaluation and an opinion on whether appellant's continuing disability was due to residuals of his accepted employment conditions. Dr. Bryant examined appellant on June 8, 1981 and in a report dated June 23, 1981 diagnosed "lumbosacral degenerative arthritis with some spondylolysis," found that appellant's varicose veins were asymptomatic and that appellant was capable of employment provided any employment accepted did not involve lifting heavy objects or sitting or standing for prolonged periods. Dr. Bryant enclosed with his report a work restriction evaluation form setting forth appellant's work tolerance limitations and restricting appellant to a four to six-hour work day. An Office medical adviser in reviewing Dr. Bryant's work restriction evaluation form noted that on such form Dr. Bryant indicated that appellant could sit for four hours a day on an intermittent basis and stand for six hours on an intermittent basis and, therefore, interpreted Dr. Bryant's report to mean that appellant could work an eight-hour day.

Following receipt of Dr. Bryant's report, the Office proceeded to develop the case record in an effort to determine appellant's wage-earning capacity. On a job classification form (Form CA-66) dated January 19, 1982, an Office wage-earning capacity specialist selected the job of full-time cashier II [2] as suitable for appellant noting that this position was primarily sedentary, requiring lifting to no more than ten pounds, which was compatible with Dr. Bryant's work restriction evaluation form. The specialist found that the average weekly wage of a cashier II was $134.00 based on information provided by the State of Florida's Department of Human Resources and verified, through contact with the Miami Branch of the Florida Employment Service, that the position was reasonably available in appellant's commuting area.

Based on the medical report of Dr. Bryant, the report of the wage-earning capacity specialist and information furnished by the employing establishment with respect to appellant's applicable pay rate, the Office determined that the position of cashier II was suitable for appellant given his physical limitations and experience and, applying the formula set forth in the *Shadrick* decision [3] to this information, the Office determined that appellant had a 31 percent wage-earning capacity or, alternatively, a 69 percent loss of wage-earning capacity.

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[2] Code number 211-462-010 in the Department of Labor's *Dictionary of Occupational Titles* (4th ed. 1977).

[3] *Albert C. Shadrick*, 5 ECAB 376 (1953).

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By decision dated January 22, 1982, the Office found that the medical evidence of record established that appellant was no longer totally disabled for work, that he was physically qualified for, and capable of performing the duties of a full-time cashier II, that such position represented appellant's wage-earning capacity and the Office therefore reduced appellant's compensation accordingly effective February 25, 1982. The Office enclosed with its decision a copy of the job description of a cashier II and its physical requirements.

By letter dated January 28, 1982, appellant requested reconsideration of the January 22, 1982 decision of the Office and in support of his request alleged that his condition was worse and that he could not meet the physical requirements of cashier II position. Appellant submitted the January 27, 1982 report of his treating physician, Dr. Manuel de J. Rodriguez, an internist, who stated that appellant's condition was worse and that he is unable to sit or stand for even short periods of time. Appellant also claimed that he was not qualified for the job because of his educational background which, appellant advised, only extended to the third grade.

The Office, in reviewing appellant's request for reconsideration, found that a supplemental opinion was required from Dr. Bryant in order to clarify whether he believed that appellant was capable of working an eight-hour day as interpreted by the Office medical adviser and requested such clarification by letter dated April 6, 1982. The Office also requested that Dr. Bryant review the job description of a cashier II and comment on whether he believed that appellant was physically capable of performing this job. By letter dated April 8, 1982, Dr. Bryant stated that it was his opinion that appellant was capable of working an eight-hour day and that he was physically capable of performing the duties of a cashier II.

By letter dated April 30, 1982, the employing establishment notified the Office that it had offered appellant the possibility of participation in a light-duty program but that appellant declined consideration of even the possibility of participation in such program and elected to revert back to receipt of civil service disability retirement annuity.

By compensation order dated April 28, 1982, which incorporated a memorandum summarizing the evidence, the Office terminated appellant's compensation benefits effective April 22, 1982 on the basis that he refused to seek suitable work by refusing to accept the offer of participation in the employing estalishment's light-duty program. By letter dated May 3, 1982 the Office advised appellant that although he was not entitled to monetary compensation benefits, he remained entitled to continuing medical treatment for his accepted condition of varicose veins.

By letter dated May 27, 1982, appellant requested reconsideration of the Office's decision and in support of his request stated that the Office, in determining whether appellant was capable of light-duty work, focused on his varicose veins condition and did not give any consideration to his back condition, pointing out that he sustained employment-related injuries in 1953 and 1966. By letter dated June 3, 1982, the Office informed appellant that Dr. Bryant, in examining appellant, was aware of appellant's back problems but concluded that despite such problems appellant was capable of full-time light-duty work. The Office advised appellant that if he wished to pursue his request for reconsideration he must submit new medical evidence addressing the issue of total disability. Appellant subsequently submitted the June 16, 1982 report of Dr. Rodriguez who stated that appellant continued to suffer from severe peripheral vascular disease of the lower extremities, that appellant's disabling back problems had developed into a chronic condition and that, as appellant's physician, he had advised appellant not to return to work including any sedentary type of work.

By letter dated May 8, 1985, appellant requested that his compensation benefits be reinstated and in support of his request,[4] submitted the April 24, 1985 report of Dr. Rodriguez who reiterated that appellant was totally disabled for work due to his back condition and his severe venous insufficiency of the lower legs. Dr. Rodriguez stated that appellant's condition had not improved and was becoming progressively worse.

By compensation order dated October 29, 1985, which incorporated a memorandum summarizing the evidence, the Office vacated its prior order of April 28, 1982 which suspended appellant's compensation benefits for refusal to accept suitable work. In the memorandum, the Office noted that there was now medical evidence of record, the April 24, 1985 report of Dr. Rodriguez, which created a conflict in medical opinion as to appellant's ability to perform suitable employment and which necessitated resolution by an impartial medical specialist. In an accompanying decision dated October 29, 1985, the Office found that appellant was entitled as of April 22, 1982 to compensation benefits based on his wage-earning capacity as a cashier II and based on the compensation rate of 66⅔ percent. The October 29, 1985 decision was subsequently corrected and superseded by the November 17, 1986 decision of the Office which authorized payment to appellant, effective May 1, 1986, of compensation based on his wage-earning capacity as a cashier II and the corrected applicable compensation rate of 75 percent.[5]

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[4] The record does not indicate the reason for inaction by the Office following appellant's June 1982 request for reconsideration

On May 4, 1987, the Office referred appellant, his case file, together with a statement of accepted facts and a list of specific questions, for examination and evaluation by Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, serving as an impartial medical specialist pursuant to 5 U.S.C. section 8123 to resolve the conflict in medical opinion of record.[6] Dr. Millheiser examined appellant on May 14, 1987 and in a report of the same date reviewed appellant's medical history, disclosed findings upon examination, noting that x-rays showed osteoarthritic changes at the L5–S1 disc space but that physical findings revealed only mild tenderness in, and mild limitation of motion of, the lumbar spine, no spasm and no motor or sensory loss in the lower extremities, and that appellant's gait was normal. Dr. Millheiser diagnosed chronic sprain of the back and stated that it was his opinion that appellant could perform light-duty work. In a supplementary report dated July 30, 1987, Dr. Millheiser, in response to a question by the Office, stated that it was his opinion that appellant's back problems dated back to his 1966 employment injury. Dr. Millheiser subsequently submitted a work restriction evaluation form which indicated that appellant had reached maximum medical improvement, set forth appellant's work tolerance limitations and opined that appellant could work an eight-hour day. On the basis of Dr. Millheiser's report the Office found that the weight of the medical evidence supported that appellant was capable of full-time light-duty employment and that Dr. Millheiser's work restriction evaluation form supported that appellant was capable of performing the duties of a cashier II and, therefore, no modification of appellant's current compensation benefits was warranted.

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[5] Although the November 17, 1986 decision lists the effective date of payment of appellant's compensation based on wage-earning capacity as May 1, 1986 such benefits were technically reinstated effective April 22, 1982 as set forth in the October 29, 1985 decision but payment of compensation to appellant did not commence until May 1, 1986 because the Office was required to reimburse the Office of Personnel Management for money paid to appellant in the form of civil service retirement annuity during the period April 22, 1982 to April 30, 1986. The record indicates that the purpose of the November 17, 1986 decision was to correct appellant's compensation rate which was listed incorrectly on the October 29, 1985 decision.

[6] The record indicates that the Office initially referred appellant and his case record to Dr. Charles B. Kahn, a Board-certified orthopedic surgeon, to serve as an impartial medical specialist. Dr. Kahn examined appellant on November 14, 1985 and in a report of the same date found that appellant's disability for employment was due to his nonemployment-related condition of degenerative disc disease and had very little to do with his employment-related condition of varicose veins. Dr. Kahn found that appellant could work three to four hours a day in light-duty employment and submitted a work restriction evaluation form. By letter dated March 18, 1986, the Office informed Dr. Kahn that it had failed to provide him with a statement of accepted facts which it was required to do, submitted the requisite statement and requested that Dr. Kahn advise the Office whether the opinions expressed in his November 14, 1985 report remained the same following his review of the statement of accepted facts. The record indicates that Dr. Kahn did not respond to this letter and, therefore, the Office could not consider report his as the report of an impartial medical specialist resolving the conflict in medical opinion. *See Leonard W. Waggoner*, 35 ECAB 461, 476 (1983).

By letter dated November 7, 1987, appellant requested that the Office reconsider his claim of total disability. In support of this request, appellant submitted a copy of the November 14, 1985 report of Dr. Kahn and a November 2, 1987 report of Dr. Rodriguez. In his November 2, 1987 report, Dr. Rodriguez reiterated that appellant was permanently and totally disabled due to his lower back problems and that he exhibited marked limitation of motion of his lumbar spine and could not tolerate more than 30 minutes in one position. Dr. Rodriguez, however, did not provide an opinion on whether he believed appellant's back problems result from his osteoarthritis and/or his employment injuries and failed to disclose specific findings, measured in terms of degrees, as to appellant's range of limitation of motion.

By compensation order dated December 23, 1987, which incorporated a memorandum summarizing the evidence, the Office reviewed appellant's case on the merits under 5 U.S.C. section 8128 and denied modification of its November 17, 1986 decision on the basis that the evidence submitted by appellant in support of reconsideration was insufficient to warrant modification of the prior order. The Office noted that the November 14, 1985 report of Dr. Kahn was previously of record and that the November 2, 1987 report of Dr. Rodriguez was insufficient to overcome the weight of the medical evidence represented by the report of Dr. Millheiser, the impartial medical specialist.

The Board finds that the Office of Workers' Compensation Programs has not met its burden of proof in establishing that the position of cashier II fairly and reasonably represents appellant's wage-earning capacity.

It is well-established that once the Office of Workers' Compensation Programs has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits it has the burden of justifying a subsequent reduction in compensation benefits.[7]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injury and the degree of physical impairment, his usual employment, his age and vocational qualifications, and the availability of suitable employment.[8] In accordance with the concept of wage-earning capacity, generally, when the Office makes a medical determination of partial disability and of the specific work restrictions, the claimant's case should be referred to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market which fits the employee's capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open market labor should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentages of the employee's loss of wage-earning capacity.[9]

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[7] *Samuel J. Russo*, 28 ECAB 43 (1976); *Harold S. McGough*, 36 ECAB 332 (1984).

In the instant case, the record supports that the Office followed its established procedures in determining appellant's wage-earning capacity except with respect to the issue of whether it properly considered whether appellant, with a third grade education, is in fact, a suitable candidate for the position of cashier II. The record does not indicate that the Office considered this aspect in selecting the cashier II position for appellant.[10]

The record supports that the Office made a proper determination, based on the medical evidence of record, that appellant was no longer totally disabled for employment and was capable of full-time light-duty employment. The Office based its initial determination of appellant's ability to work on the June 23, 1981 and April 8, 1982 reports of Dr. Bryant, a Board-certified surgeon and the Office referral physician, who found that appellant was capable of full-time employment and, specifically, was physically capable of performing the duties of a cashier II. This determination of appellant's ability to work was subsequently supported by Dr. Millheiser, a Board-certified orthopedic surgeon, requested to serve as an impartial medical specialist pursuant to 5 U.S.C. section 8123 to resolve a conflict in medical opinion between appellant's physician, Dr. Rodriguez, and Dr. Bryant, on the issue of appellant's ability to perform full-time light-duty employment. Dr. Millheiser, following his May 14, 1987 examination of appellant and a review of the medical evidence of record, found that appellant's physical limitations, attributable to his accepted condition of back strain, were not so disabling that he was incapable of working an eight-hour day in a light-duty capacity and submitted a work restriction evaluation form setting forth appellant's work-tolerance limitations.[11]

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[8] Larson, *The Law of Workers' Compensation*, section 57.21; 5 U.S.C. section 8115(a). *See also Williams H. Goff*, 35 ECAB 581 (1984); *David Smith*, 34 ECAB 409 (1982).

[9] *See Warren* [illegible] *Cook*, 34 ECAB 1535 (1983). *See* Federal (FECA) Program Memorandum No. 77 (as amended May 9, 1983), which provides:

> "In determining the employee's loss of wage-earning capacity, the Office must take the following steps: (1) ensure that the record contains a detailed current description of the employee's ability to perform work in a disabled condition, including capacity to lift, stand, walk, etc.; (2) ensure that the record contains a complete description of all the duties of the offered position, and all its physical requirements; (3) ensure that the work offered to the claimant is consistent with the work capacity described in the medical report. If there is any question about compatibility, the case *must* be referred to the Office medical adviser or to the attending physician."

See also Mary A. Henson, 36 ECAB 565 (1985).

[10] *See Thelma A. Borter*, 32 ECAB 1203 (1981).

The record supports that the Office, following receipt of Dr. Bryant's report, properly referred appellant's case record to an Office wage-earning capacity specialist who selected the position of cashier II from the Department of Labor's *Dictionary of Occupational Titles* as suitable for appellant. The Office wage-earning capacity specialist noted that the physical requirements of a cashier II were compatible with appellant's physical limitations as noted by Dr. Bryant in his work restriction evaluation form and also were compatible with appellant's physical limitations as subsequently noted by Dr. Millheiser in his work restriction evaluation form for appellant. However, there is no indication from the record that the Office, either at the time of its original wage-earning capacity determination or subsequent thereto, confirmed whether appellant with his third grade educational background is qualified, other than physically, for the position of cashier II.

Under section 8115 of the Federal Employees' Compensation Act,[12] the Office is required to consider appellant's "qualifications for other employment," under which category falls appellant's educational background.[13] Although the job classification description does not provide any indication that any minimal educational background or specialized work experience is required,[14] given appellant's limited schooling and the fact that the duties of the cashier II position include "recording amounts received and preparing reports of transactions, issuing credit memoranda to customers for returned merchandise," further investigation into appellant's suitability and eligibility for such a position is warranted.

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[11] It is well-established that when an impartial medical specialist is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight. *See James P. Roberts*, 31 ECAB 1001 (1980). The Board finds that the May 14, 1987 report of Dr. Millheiser constitutes the weight of the medical evidence. The November 14, 1985 report of Dr. Kahn, a Board-certified orthopedic surgeon, and the November 2, 1987 report of Dr. Rodriguez submitted by appellant in support of his November 7, 1987 request for reconsideration of the Office's November 18, 1986 decision are insufficient to overcome the weight of the medical evidence represented by the report of Dr. Millheiser. The November 14, 1985 report of Dr. Kahn was of record at the time the Office rendered its November 16, 1986 decision and therefore did not constitute new evidence. Additionally, this report is not supportive of appellant's claim of total disability as Dr. Kahn found that appellant was capable of working part-time and his continuing disability was due to his nonemployment-related degenerative disc disease. The November 2, 1987 report of Dr. Rodriguez primarily reiterated statements made in earlier reports that appellant was totally disabled due to his "back problems" and failed to address with any degree of specificity the cause and nature of appellant's disability which therefore diminished the probative value of his report.

[12] 5 U.S.C. section 8101 *et seq.*; *See* 5 U.S.C. section 8115.

[13] *See Thelma E. Borter, supra* note 10.

[14] *See Steve Costello*, 37 ECAB 251 (1985).

Accordingly, the case must be remanded to the Office for further development of the record and a *de novo* determination of appellant's wage-earning capacity which takes into consideration his educational background in addition to his physical limitations and all other relevant factors as required by 5 U.S.C. section 8115.

The decision of the Office of Workers' Compensation Programs dated December 23, 1987 is hereby reversed and the case remanded for further proceedings consistent with this decision.

In the Matter of JAMES T. JOHNSON *and* U.S. POSTAL SERVICE, POST OFFICE, Greenville, Miss.

Docket No. 88-485; Submitted on the Record;
Issued August 30, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant had any disability causally related to his November 29, 1962 employment injury after March 13, 1987, the date the Office of Workers' Compensation Programs terminated his compensation benefits.

This is the second appeal in this case to the Board. The Board's decision and order of March 20, 1986 sets forth the relevant facts and circumstances of the case and is hereby incorporated by reference.[1] The Board found that there remained an unresolved conflict in medical opinion evidence as to whether appellant's disability causally related to a November 29, 1962 employment injury had ceased by October 20, 1984, the date the Office terminated appellant's compensation benefits. The Board noted that the physician selected to serve as the impartial medical specialist had performed fitness-for-duty examinations for the employing establishment and was therefore ineligible to serve as an impartial medical referee under 5 U.S.C. section 8123(a).[2] The case was remanded to the Office to refer appellant, together with an updated statement of accepted facts and the case record, to an impartial medical specialist for an opinion on whether appellant's disability causally related to the November 29, 1962 employment injury had ended.

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[1] Docket No. 85-1865, issued March 20, 1986.

On remand, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Robert Riley Jones, a Board-certified orthopedic surgeon.[3] The Office requested that Dr. Jones review the case file and statement of accepted facts and respond to specific Office inquiries as to appellant's diagnosis, and as to whether appellant had any current condition which could be related to the November 29, 1962 employment injury. The Office additionally requested that Dr. Jones provide an opinion on whether appellant was disabled for work due to residuals of the employment injury and, if so, provide a description of the nature and extent of any residual disability. In an unsigned medical report dated September 9, 1986 Dr. Jones noted appellant's history of injury and noted that appellant had continuing complaints of low back pain with radiation down the left leg. Dr. Jones noted that appellant's physical examination revealed a negative straight leg raising test in the sitting position with a positive test in the supine position at 45 degrees. X-rays were reviewed by Dr. Jones which showed a decreased joint space at L5-S1 with sclerotic facets at L5-S1. Dr. Jones referred appellant for a computerized tomography (CT) scan noting: "I am not sure we are not primarily dealing with just a degenerative facet."

Appellant underwent a CT scan on September 23, 1986 by Dr. B. L. Davis-Grant, a Board-certified radiologist, who reported a decreased interspace at L5-S1, a vacuum disc phenomena, Schmorl's nodes and calcification along the posterior longitudinal ligament midline. A tiny focal bulge was viewed at the L4-L5 level. No evidence was obtained of a herniated nucleus pulposus. Dr. Davis-Grant diagnosed degenerative disc disease of L5-S1 and L4-L5.

By letter dated January 7, 1987 the Office advised Dr. Jones that it had received his September 9, 1986 report. The Office referred Dr. Jones to the Office's referral letter and noted that Dr. Jones had diagnosed mild degenerative joint disease. The Office requested Dr. Jones to respond to whether appellant's physical status would be the same regardless of the November 29, 1962 employment injury and whether appellant's findings were compatible with an individual of appellant's age.

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[2] 5 U.S.C. section 8123(a). *See George W. Coast*, 36 ECAB 600 (1985) in which the Board noted that a physician selected as the impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. The Board noted the selection of a physician with a prior association with the employing establishment undermined the appearance of impartially sought under section 8123(a).

[3] The Board notes that appellant was initially referred to Dr. William E. Anderson; however, the physician declined the medical referral.

In a report dated February 17, 1987 Dr. Jones responded by stating:

> "In regard to [appellant], the patient who was injured on November 29, 1962. The patient is now 53 years of age and his examination is much as that I would expect out of a 53-year-old male. I am not sure that his injury as of November 29, 1962 would have changed his present status. He had a CAT scan which only showed mild degenerative changes and these would be, from my standpoint, would be essentially consistent with being 53."

By compensation order dated March 13, 1987 the Office terminated appellant's compensation benefits finding that "there is no further compensable disability." In an attached memorandum, an Office claims examiner noted that the reports of Dr. Jones represented the weight of medical opinion. The records indicate that the Office deleted appellant from the compensation rolls effective March 13, 1987.

Appellant requested a hearing before an Office hearing representative which was held on September 14, 1987. Prior to the hearing, appellant's attorney submitted medical reports to the Office consisting primarily of medical reports previously of record. Appellant also submitted the June 16, 1986, March 24, 1987, and September 1, 1987 reports of Dr. Lloyd A. Merbitz, his attending physician, who noted that appellant's CT scan and EMG revealed findings compatible with peripheral neuropathy which the physician related to appellant's accepted employment injury. Dr. Merbitz indicated that appellant remained totally disabled to return to his employment as a letter carrier.

In a decision dated and finalized December 4, 1987, the Office hearing representative affirmed the Office's March 13, 1987 compensation order finding that Dr. Jones' medical reports were sufficient to resolve the conflict in medical opinion.

The Board finds that the Office of Workers' Compensation Programs did not meet its burden of proof in terminating appellant's compensation benefits effective March 13, 1987.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4]

Appellant sustained an injury on November 29, 1962 while reaching in the back of his postal vehicle for a package. Appellant's claim was accepted by the Office for a lumbosacral strain, and an acute and chronic lumbar strain with radiculitis of the left leg. Compensation benefits have been paid by the Office for appellant's disability related to the accepted employment injury.

At the time of the prior appeal, the Board found that the Office did not meet its burden of proof in terminating appellant's compensation effective October 20, 1984. The Board noted that the physician selected to provide a medical evaluation and opinion under section 8123(a) had performed fitness-for-duty evaluations for the employing establishment. The case was remanded to the Office with instructions to refer appellant, together with an updated statement of accepted facts and case record, to a new medical specialist for an impartial examination under section 8123(a).

Appellant was referred by the Office to Dr. Jones; however, the Board finds that the reports submitted by Dr. Jones are not sufficient to resolve the conflict in medical opinion. The statement of accepted facts prepared by the Office was inadequate, noting only that appellant had worked partial days since October 1982. There were no pertinent facts prepared by the Office upon which Dr. Jones could base his opinion. Given this deficiency in the statement of accepted facts, Dr. Jones' September 9, 1986 report provides only a cursory review of appellant's complaints of low back pain with radiation down the left leg. There is no review of any medical findings by prior medical examiners which gave rise to the conflict in medical opinion. The physical examination and x-ray findings of Dr. Jones were briefly described and the physician provided only a tentative diagnosis pending further diagnostic testing to rule out facet problems. The September 9, 1986 report of Dr. Jones is incomplete on its face and provided no response to the questions posed by the Office in the medical referral letter to Dr. Jones. As completed, this medical report provides no basis for supporting the Office's termination of appellant's medical benefits.

The record notes that appellant underwent diagnostic testing which consisted of a CT scan on September 23, 1986 by Dr. Davis-Grant. Thereafter, the Office requested Dr. Jones to provide a further medical report. The Board notes, however, that the January 7,

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[4] *Vivien L. Minor*, 37 ECAB 541 (1986); *John Wilkes, Jr.*, 36 ECAB 451 (1985).

1987 letter from the Office to Dr. Jones contains questions which are "leading" in that Dr. Jones was to respond to whether appellant's physical status would be the same regardless of the November 29, 1962 injury based on his age. The response obtained from Dr. Jones on February 17, 1987 was unrationalized, contained no reference to the findings made on examination, and contained only the speculative opinion: "I am not sure that his [appellant] injury as of November 29, 1962 would have changed his present status."

Under section 8123(a) the report of an impartial medical specialist will be accorded special weight upon review by the Board provided that the medical report obtained from such specialist is sufficiently well-rationalized and based upon a proper factual background.[5] The Board reviews the medical evidence to determine whether the medical report was based on incomplete information and looks at such factors as the opportunity for and thoroughness of examination performed by the physician; the accuracy and completeness of the physician's knowledge of the facts and medical history; the care of analysis manifested; and the medical rationale expressed by the physician on the medical issues addressed to him by the Office.[6] Against these factors, the medical reports obtained from Dr. Jones are not sufficient to resolve the conflict in medical opinion and are tainted by the leading questions posed by the Office.[7] For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation benefits effective March 13, 1987.

The December 4, 1987 decision of the Office of Workers' Compensation Programs is reversed.

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[5] *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[6] *See Adrienne L. Wintrip*, 38 ECAB 373 (1987), and cases cited therein.

[7] *Hugh C. Dalton*, 36 ECAB 462, 473 (1985).

In the Matter of DEBRA A. KIRK *and* U.S. POSTAL SERVICE, POST OFFICE, Oklahoma City, Okla.

Docket No. 88-1232; Submitted on the Record;
Issued August 25, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for separation of her claims filed on November 21, 1986 and December 23, 1986; and (2) whether the Office properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.

On November 21, 1986 appellant, then a 27-year-old postal clerk, filed a claim for traumatic injury asserting that she had "severe hives or welts on face, neck, chest, upper back, ears" due to the cleaning solution (orthodichlorobenzene) used at the employing establishment, and that the "first notice of irritation [was] on November 20, 1986."

On December 23, 1986 appellant filed a claim for occupational disease asserting that she sustained "severe skin and throat irritation" due to toxic exposure to orthodichlorobenzene which was used to mop the floors at the employing establishment.

The Office of Workers' Compensation Programs began processing the claims as a single occupational disease claim, as both claims were based on continued exposure of longer than a single day to the cleaning solution containing orthodichlorobenzene.

By letters dated August 24 and 25, 1987 appellant requested a hearing.

By compensation order dated August 28, 1987 the Office suspended further processing of the claim on the ground that appellant had refused to undergo medical examination.

By letter decision dated October 21, 1987 the Office denied the August 24, 1987 hearing request on the ground, *inter alia*, that the suspension of her claim would be lifted upon her "expressing a willingness to be examined and cooperating with any subsequent examination scheduled."

By letter dated November 21, 1987 appellant informed the Office that she would undergo the medical examinations requested by the Office.

By letter dated November 27, 1987 the Office informed appellant that it would schedule another medical examination, and effectively lifted the suspension of her claim.

By letter dated February 17, 1988 appellant requested that her claims filed on November 21 and December 23, 1986 be separated because the prior claim was for skin irritation and the latter claim was for throat irritation.

By letter dated February 3, 1988 appellant requested a hearing.

By compensation order dated March 9, 1988 the Office denied appellant's request for separation of her claims on the ground that as the claims were both occupational in nature and involved the same alleged factor of employment, separation "would be frivolous and a duplication of effort."

By letter decision dated April 27, 1988 the Office denied appellant's February 23, 1988 hearing request, finding that as the suspension of her claim had been lifted, no hearing was necessary on that issue, and that appellant did not request a hearing with regard to the Office's March 9, 1988 decision.

The Office decisions dated August 28, 1987 and October 21, 1987 regarding the suspension of the claim for refusal to undergo medical examination are not before the Board as the suspension has been lifted.

The Board finds that the Office properly denied separation of the claims filed on November 21, 1986 and December 23, 1986.

Although appellant filed two claim forms, the first one for traumatic injury and the second for occupational disease, this case involves a single occupational disease claim. Under section 10.5(a)(15) of the regulations promulgated pursuant to the Federal Employees' Compensation Act, "traumatic injury" is defined as: "a wound or other condition of the body caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. The injury must be caused by a specific event or incident or series of events or incidents within a single work day or work shift."[1] As appellant's alleged exposure to the orthodichlorobenzene was for a period longer than a single work day or work shift, her claim cannot be considered a traumatic injury claim.

Section 10.5(a)(16) of the regulations defines "occupational disease or illness" as: "a condition produced in the work environment over a period longer than a single work day or shift by such factors as systemic infection; continued or repeated stress or strain; or exposure to hazardous elements such as, but not limited to, toxins, poisons, fumes, noise, particulates, or radiation, or other continued or repeated conditions or factors of the work environment."[2] Thus, appellant's claim must be considered and processed as a single occupational claim.

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[1] 20 C.F.R. section 10.5(a)(15).

Appellant argued that the claim should be separated because she allegedly sustained separate injuries to her skin and throat. However, the fact that occupational exposure may have affected more than one body part or function does not justify processing the claim separately for each body part or function affected. Separately processing such a claim for each body part or function allegedly affected would not only be "frivolous and a duplication of effort" as found by the Office, it would significantly delay the processing and ultimate disposition of the case, which would be deleterious to the claimant. For the foregoing reasons the Board finds that the Office properly denied separation of the claim and properly processed the claim as a single occupational disease claim.

The Board further finds that the Office properly denied appellant's request for a hearing pursuant to section 8123(b) of the Federal Employees' Compensation Act.

At the time appellant requested a hearing by letter dated February 23, 1988, there was no adverse decision to be reviewed, as the Office had lifted its prior suspension of the claim for refusal to undergo a medical examination and had resumed processing the claim. Appellant did not request a hearing with regard to the Office's March 9, 1988 decision. Moreover, section 8124 of the Act provides for hearings only in regard to an Office decision "for or against the payment of compensation."[3] As the Office has yet to issue a decision for or against the payment of compensation,[4] appellant was not entitled to a hearing.

The decisions of the Office of Workers' Compensation Programs dated March 9, 1988 and April 27, 1988 are hereby affirmed.

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[2] 20 C.F.R. section 10.5(a)(16).

[3] 5 U.S.C. section 8124.

[4] A memorandum dated May 26, 1988 by Office personnel indicates that a compensation order on the merits of this case was typed and dated May 26, 1988 but that on May 24, 1988 the case record was requested by the Board pursuant to this appeal and the Office lost jurisdiction on that date. The memorandum indicated that the compensation order was being held in abeyance pending a decision by the Board. Upon return of the case record to the Office, it should promptly issue a compensation order on the merits of the case.

In the Matter of JOSEPH C. DEDONATO *and* U.S. POSTAL SERVICE, POST OFFICE, Hicksville, N.Y.

Docket No. 88-809; Submitted on the Record;
Issued August 26, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's panic attack and emotional condition on July 30, 1986 constituted an injury sustained in the performance of duty.

On August 1, 1986 appellant, then a 52-year-old distribution clerk, filed a notice of injury claiming that on July 30, 1986 he experienced a "panic attack, nausea, and diarrhea followed by extreme depression" as a result of receiving a July 29, 1986 letter from the employing establishment. The letter advised appellant that he was "being carried on 'Absent Without Leave' (AWOL) status from July 8, 1986 on to that date for failure to comply with Part 513.362 of the Employee and Labor Relations Manual"; that part of the manual details an employee's responsibilities in substantiating an absence based on illness or injury. The letter also stated that failure to comply with part 513.362 within seven days could result in termination of employment with the employing establishment.

The employing establishment had removed appellant from his former position as a postmaster effective July 6, 1982; he was found by the employing establishment to be ineligible for work during the period July 6, 1982 to April 5, 1986; on April 3, 1986 appellant's occupational disease claim No. A2-497605 for alleged employment-related depression and anxiety was denied by the Office of Workers' Compensation Programs finding that appellant's condition was not causally related to factors of employment; and effective April 5, 1986 appellant was ordered reinstated to employment with the employing establishment as a distribution clerk by decision of a U.S. District Court. Appellant did not return to work that date and he failed to provide medical reasons for his failure to report. On July 29, 1986 the employing establishment issued a certified letter charging appellant with being absent without leave, the receipt of which allegedly caused appellant to experience the symptoms which are the subject of the present claim No. A2-561409.

On August 5, 1986 the employing establishment injury compensation specialist issued a completed CA-16 authorization for examination of appellant by Dr. David M. Silberhartz, a Board-certified psychiatrist and appellant's attending physician.

In an August 7, 1986 letter to the Office appellant stated as follows:

> "At the time of my injury, I was engaged in reading an official communication, specifically directed to me from the Labor Relations Division of my agency marked official business. That letter officially informed me of my current employment status. It was delivered to me by an agency employee and I was required to sign for it. Therefore, accepting and reading that communication became my official responsibility as an employee of the agency in the performance of his duties."

Dr. Silberhartz completed the CA-16 on August 15, 1986 noting a history of injury as "[appellant] complained of panic attacks, nausea, diarrhea, and extreme depression, exacerbated after reading official communication from the [employing establishment]." Dr. Silberhartz noted that he first examined appellant on August 2, 1985 and that appellant had a history of a preexisting and concurrent problem diagnosed as a major depressive disorder and post-traumatic stress syndrome related to his postal employment. Dr. Silberhartz noted that current findings included depression with marked anxiety, anorexia with weight loss, insomnia with recurrent nightmares related to ongoing job-related problems, anhedonia with constricted affect and a generalized loss of interest, self-isolating behavior with feelings of hopelessness and helplessness, and anxiety-related somatic problems including nausea and diarrhea. He opined that a permanent anticipated effect was that appellant would be unable to return to postal employment and he noted that appellant should not be exposed to any type of postal situation, work or nonwork, as it would aggravate his condition. Dr. Silberhartz opined that appellant was permanently totally disabled from April 20, 1982, and noted that any date of appellant's discharge from psychochemotherapeutic treatment was undetermined.

On a CA-17 duty status report that date Dr. Silberhartz noted that appellant had no physical restrictions because his disability was entirely emotional, and noted that appellant had fears of being in any postal environment and should not return to employment with the employing establishment.

By letter dated August 15, 1986 the employing establishment controverted appellant's claim noting that he had not worked since 1982; that he was removed from his position as postmaster of the

Selden, N.Y. branch of the employing establishment on July 6, 1982; that by decision of the U. S. District Court and the Merit Systems Protection Board appellant was assigned to the position of distribution clerk effective April 5, 1986; and that he did not report for duty and did not provide medical reasons for his failure to report as assigned. The employing establishment noted that in accordance with Article 16 of the National Agreement which covered disciplinary procedures, appropriate letters of a corrective nature were sent to the employee regarding his prolonged absence, and that appellant claimed that the receipt of such a July 29, 1986 letter triggered his claimed condition; the employing establishment also noted that appellant's claim for continuation of pay was not being honored because he was not on employing establishment premises or on official off-premise duties at that time he experienced his alleged injury.

By compensation order dated September 10, 1986 the Office rejected appellant's claim finding that appellant did not sustain his alleged condition while in the performance of his duties. Appellant's medical expenses incurred under the CA-16 authorization for the period August 5, 1986 through September 10, 1986 were reimbursed.

By letter dated October 6, 1986 appellant requested a hearing before an Office hearing representative on the rejection of his claim.

A hearing was held on February 2, 1987 at which appellant testified; appellant stated with regard to the July 29, 1986 letter that there were "two basic things that caused [him] a great deal of trauma, the refusal of payment of salary and refusal of payment of sick leave, and the fact that it [was] obvious to [him] that they were then contemplating [his] removal for [being] A.W.O.L. [absent without leave]." Appellant further testified that on July 30, 1986 he was not working but he was being carried on the employment rolls by order of the Merit Systems Protection Board. Appellant also stated that the most recent date that he was actually employed performing the duties of his position in pay status, not on leave or in other status, was July 6, 1982. Appellant stated that the Merit Systems Protection Board originally upheld the termination, but that the U.S. Circuit Court of Appeals for the Federal Circuit reversed the removal and remanded the case to the Merit Board to reconsider his reinstatement with a reduction in grade, retroactive to July 6, 1982. Appellant stated that the employing establishment reduced him from a PES 20 grade to a PS 5 clerk without restoring any of his benefits. Appellant stated that he began requesting sick leave on April 16, 1986 when he recognized he was unable to return to employment with the employing establishment. He stated that he submitted a PS form 3971 indicating an anticipated absence of undetermined length due to a present emotional illness which currently disabled him and which became aggravated when he was exposed to any type of postal environment. He noted at the bottom: "I request sick leave from the position you have currently assigned me to, although this is still a matter of legal dispute before MSPH. Should you require medical evidence for this absence, please provide a written request." Appellant stated that the employing establishment sent him an immediate response dated April 17, 1986 in which it instructed appellant to comply with employing establishment regulations within five days since his current absence had exceeded three days. Appellant stated that he responded: "Enclosed is my affidavit, which I submit to you as evidence of my illness, . . . should there by anything else you require, please notify me." Appellant also stated that on April 21, 1986 the employing establishment sent a representative to the Office to "get an update of all the medical evidence . . . contained in . . . file No. A2-479605, and they were provided with . . . doctor's statements and statements from myself . . . documenting my illness." Appellant submitted an exhibit consisting of an Office memorandum to the file concerning his prior claim advising that photocopies were made from the case record, which appellant claimed was done by the employing establishment "so that they had all that information with regard to my disability." Appellant stated back pay was not allowed because the employing establishment found him ineligible for failure to meet the requirement that to receive back pay, a person must be ready, willing and able to perform his assigned duties. Appellant had provided a statement crossing out the word "ready" and noting "I was and still am disabled by an emotional illness caused by abusive treatment from the postal officials and from the unwarranted removal from the [employing establishment] from throughout the entire proceedings to date." Appellant stated that the MSPB denied him back pay based on an employing establishment statement that "appellant clearly failed to show that he was able to perform the duties of the position."

In response to the hearing representative's attempt to clarify appellant's argument that his engaging in correspondence with the employing establishment, which ultimately resulted in the July 29, 1986 letter, allegedly causing his current disability, was in fact a part of his recurring employment duties, appellant stated that "all this communication [between] . . . myself and the [employing establishment] was going on through official mail. I mean, their letters to me were marked official business. It was in postal envelopes, postage free. Mine to them was the same thing. This official post office business." Appellant also stated that the employing establishment sent him envelopes for his response. Appellant testified that on June 13, 1986 he received the MSPB decision dismissing his request for back pay which noted that "medical evidence established that despite his willingness to work, appellant was not medically able to do so." Appellant argued that if the employing establishment had full knowledge of his condition, regulations required that sick leave be paid and absence without leave not be charged. Appellant further testified that on July 7, 1986 he received two letters of warning charging him with being AWOL, with failing to follow instructions, and with failing to go for a medical examination. Appellant stated that on July 8, 1986 he received another certified letter regarding his application for sick leave and being AWOL. Appellant sent further leave requests and an application for disability retirement and stated that on August 8, 1986 he received a letter proposing to remove him from employment for being AWOL. Appellant stated that "the fact that they wouldn't give me any explanations and wouldn't tell me what's required of me to comply with whatever their standard was causing me a great deal of frustration. In other words, it's not only that letter that caused the trauma, but it was a continuous trauma because they never would respond and answer what they wanted. . . ." Appellant concluded by testifying that he began to work with the employing establishment as a letter carrier in 1960 and advanced to the position of postmaster in 1972; he noted that he continued to suffer physical symptoms as a result of his emotional condition that he related to his employment, and stated that he had not been employed anywhere in any capacity since 1982.

By decision dated March 26 and finalized March 27, 1987 the Office hearing representative affirmed the September 10, 1986 decision finding that appellant's alleged exacerbation of his condition did not constitute an injury sustained in the performance of duty.

By letter dated May 18, 1987 appellant, through his representative, requested reconsideration of the March 27, 1987 decision. In support of the request appellant submitted a copy of the EEO final agency decision cancelling his complaint and stating the grounds.

By compensation order dated July 15, 1987 the Office denied modification of the prior decision finding the evidence submitted repetitious, irrelevant, and insufficient to warrant modification.

By letter dated August 27, 1987 appellant again requested reconsideration and submitted the EEO summary complaint, an impartial medical examiner's report regarding claim No. A2-497605, and an additional statement.

By compensation order dated September 16, 1987 the Office denied modification of the prior order finding the evidence submitted insufficient to warrant modification.

By letter dated October 5, 1987 appellant again requested reconsideration of the prior decision and provided a legal argument in support. Appellant argued that the hearing representative misapplied the law and erroneously refused to consider medical evidence extracted from a separate claim.

By compensation order dated January 7, 1988 the Office denied modification of appellant's claim finding insufficiency of the evidence submitted.

The Board finds that appellant's panic attack and emotional condition on July 30, 1986 does not constitute an injury sustained in the performance of duty.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, the disability arises out of and in the course of the employment and comes within the coverage of the Act. Conversely, where a disability results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position, the emotional condition is not covered under the Act. Disabling emotional conditions resulting from an employee's feelings of job insecurity or from the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.[1]

At the February 2, 1987 requested hearing appellant contended that his emotional disability was actually caused by several factors: the refusal by the employing establishment of payment of sick leave, the restoration of appellant's claimed back benefits, the fact that the employing establishment was contemplating his removal for being absent without leave and for failing to follow personnel instructions, and by the appellant's frustration because of the continuous trauma caused by the employing establishment's failure to respond to appellant's demands or to provide appellant's requested explanations.

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[1] *Lillian Cutler*, 28 ECAB 125 (1976).

The Board notes, however, that these factors raised by appellant are not related to appellant's regular or specially assigned work duties or to requirements imposed by his employment. The Board stated in *Ralph O. Webster* [2] that emotional conditions resulting from actions taken by the employing establishment in personnel matters such as use of leave or benefits are not sustained within the performance of duty.

In the present case the factors cited by appellant as causing his emotional condition are factors involving personnel matters, including leave, benefits, and disagreement with contemplated personnel actions. It cannot be said that these factors have such a relationship to appellant's assigned duties so as to be regarded as arising out of and in the course of the employment.[3] Because appellant's emotional condition allegedly resulted from conflicts over personnel matters, although related in certain respects to his employment, the condition did not result from appellant's assigned duties or from requirements imposed by his employment; and therefore are not within the coverage of the Act.

Appellant argues that, according to the Board holding in *Pasquale Frisina*,[4] requesting sick leave is a requirement of employment when the employee is unable to perform his duties. The Board notes that the holding in *Frisina* addresses the issue of a duty imposed upon the employee by required reporting, instead of the issue in the instant case which addresses the administrative denial of leave, and which is purely a personnel matter. Appellant also argues that, in accordance with the Board holding in *Mary Alice Cannon*,[5] the action allegedly causing the condition was illegal discrimination as opposed to a proper personnel action. The Board notes that the holding in *Cannon* does not address illegal discrimination but rather addresses clearly defined and established agency action directed to an employee on an official basis and later found to be erroneous. Such action is not evident in this case, nor has appellant made any substantive showing of any personnel action on the part of the employing establishment that was alleged to be illegal discrimination.

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[2] 38 ECAB 521 (1987).

[3] *Edgar Lloyd Pake*, 33 ECAB 872 (1982).

[4] 34 ECAB 1230 (1983).

[5] 32 ECAB 1235 (1981).

In the present case on July 30, 1986 appellant, who had not actually performed any of his assigned employment duties nor been on the employment premises since 1982, received a warning letter from the employing establishment; the fifth such letter in a series of progressively more strongly-worded advisories regarding appellant's continuing absent without leave status and his ongoing refusal to provide any contemporaneous medical documentation of his alleged disability which precluded him from working. This fifth letter stated that appellant was being carried on absent without leave status for his continued noncompliance with applicable employing establishment regulations, of which the employing establishment noted he should have been extremely familiar due to his 22-year history of employment with the employing establishment and due to the position he had held as postmaster which required him to be familiar with the content and application of such regulations. The fifth letter of warning, dated July 29, 1986, again instructed appellant to comply with applicable regulations within seven days of his receipt of the letter or risk appropriate disciplinary action, up to and including removal from the employing establishment.

The Board finds that appellant's alleged reaction to the employing establishment's July 29, 1986 letter regarding his request for sick leave, as well as his alleged reaction to the preceding letters and to the employing establishment's administrative responses to his demands, had no relationship to appellant's assigned duties or to requirements imposed upon him by his employment, but instead were related to personnel matters. The Board has found in numerous prior cases that reactions to such personnel concerns do not arise out of and in the course of employment, nor do they constitute an injury in the performance of duty within the purview of the Federal Employees' Compensation Act.

The decisions of the Office of Workers' Compensation Programs dated March 27, 1987, July 15, 1987, September 16, 1987, and January 7, 1988 are hereby affirmed.

In the Matter of EDWARD SNIDER *and* DEPARTMENT OF THE NAVY, CHARLESTON NAVAL SHIPYARD, Charleston, S.C.

Docket No. 88-1091; Submitted on the Record;
Issued August 30, 1988

Re: Attorney's Fee

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in approving an attorney's fee of $3,860.10.

David T. Pearlman, Esquire, Charleston, South Carolina, the employee's representative before the Office of Workers' Compensation Programs, requested approval of a fee in the sum of three thousand eight hundred sixty dollars and ten cents ($3,860.10) for 47.75 hours of legal services performed in the case from July 1, 1983 through January 7, 1987. The attorney stated that he had agreed to represent the employee at the rate of $100.00 per hour not to exceed ⅓ of any award received by the employee. Appellant received a schedule award for a 15 percent permanent impairment of his left hand on November 18, 1985 and a schedule award for an additional 10 percent permanent impairment of his left hand on February 5, 1987, for a total award for a 25 percent impairment of his left hand. The award of $3,860.10 attorney's fees was acceptable to Mr. Pearlman and to the employee.

By compensation order dated September 14, 1987 the Office approved an attorney's fee in the amount of $3,860.10 as being reasonably commensurate with the actual necessary work performed in representing the employee before the Office.

Subsequent to January 7, 1987 the attorney continued to represent the employee before the Office and appeared at a hearing before an Office hearing representative on December 16, 1987 representing the employee in his efforts to obtain an additional amount of schedule award. By letter dated February 12, 1988 the attorney requested that additional attorney's fees be approved. The decision of the hearing representative dated and finalized March 2, 1988 found that the employee was entitled to an additional one percent schedule award for a total schedule award for a 26 percent permanent impairment of the employee's left hand.

By letter dated April 5, 1988 the Office advised the attorney that on September 14, 1987 a formal decision on his request for attorney's fees was issued, and it advised that if he disagreed with the Office determination he should refer to his appeal rights enclosed with that decision.

By letter dated April 21, 1988 the attorney appealed the September 14, 1987 award of attorney's fees noting that the award was satisfactory to him at that time because it complied with his original agreement with the employee that his fee would not exceed one-third of the amount awarded to him, even if his hours and costs justified a greater fee. The attorney noted that his original request for a fee of $3,860.10 was based on one-third of the employee's original award for a 25 percent permanent impairment of his left hand, and noted that at the hourly billing rate of his fee should have been $4,775.00 for 47.75 hours of legal assistance rendered. The attorney concluded that because the employee's award was subsequently increased to 26 percent, the $914.90 still due for 47.75 hours of services rendered through January 7, 1987 should be approved for payment, noting that his additional request was still less than one-third of the employee's additional award.

The Board finds that the Office did not abuse its discretion in approving a fee of $3,860.10 for services rendered from July 1, 1983 through January 7, 1987.

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on the criteria set forth in 10 C.F.R. section 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.[1] Generally, an abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable excercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken, prejudice, partiality, intentional wrong, or action against logic.[2]

The record shows that the Office took into consideration the attorney's services and the criteria set forth in its regulations in fixing the approved fee. The Office concluded after a careful review of the record that a fee of $3,860.10 was reasonable for the attorney's itemized 47.75 hours of legal services rendered and the fee awarded was acceptable to both the attorney and to the employee.

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[1] *William Lee Gargus*, 25 ECAB 187 (1974).

[2] *See James W. Croake*, 37 ECAB 219 (1985); *Rosa Lee Jones*, 36 ECAB 679 (1985); *Sherwood Brown*, 32 ECAB 1947 (1981).

The Board finds therefore, that the action of the Office in approving the fee of $3,860.10 for 47.75 hours of legal services was not, as a matter of law, arbitrary or unreasonable, and did not constitute an abuse of discretion.[3] The Board additionally finds that the agreement by the attorney and the employee to the stated fee amount and the acceptance by the attorney of the fee amount for the 47.75 hours of legal services rendered, results in an accord and satisfaction of the attorney's claim for payment for the 47.75 hours of services rendered.

The record, however, does not disclose that the attorney submitted any itemization for additional hours expended in further legal services rendered on behalf of the employee and his request for an additional schedule award. Until the attorney does submit such an itemized listing of additional hours spent after January 7, 1987 providing legal services in support of the employee's request for an additional schedule award, the Office cannot render a final decision on approval or disapproval of such additional attorney's fees and the Board has no jurisdiction to consider the attorney's claim.

The decision of the Office of Workers' Compensation Programs dated September 14, 1987 is hereby affirmed.

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[3] *Hazen J. Jones*, 26 ECAB 348 (1975). The Board notes that in *Hazen J. Jones* it explained that 20 C.F.R. section 10.145(a)(2) expressly prohibits the Office from recognizing any contingent fee contract. *Id.* at 351.

In the Matter of DOUGLAS L. HOCK *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, SAN JUAN AIR TRAFFIC CONTROL CENTER, San Juan, Puerto Rico

Docket No. 88-622; Submitted on the Record;
Issued August 31, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's cataracts are causally related to his exposure to radiation in his employment.

On April 4, 1978 appellant, then 37-years-old, filed a claim for subcapsular cataracts with distant vision correctable only to 20/80 bilaterally. He attributed his condition to his employment as an air traffic control specialist and supervisory air traffic control specialist. Appellant last worked for the employing establishment on October 3, 1977 and claimed compensation beginning the following day.

Appellant submitted medical evidence in support of his claim. In a February 21, 1978 report on a form of the Office of Workers' Compensation Programs, Dr. Walter Kleis, a Board-certified ophthalmologist, diagnosed bilateral subcapsular cataracts, indicated appellant was totally disabled since October 3, 1977, and answered "yes" to the form's question whether the disability was in any way related to the history of the injury given. The history of injury was listed as "no injury hx. [history]." In an October 28, 1977 report Dr. Rowland H.S. Bedell, a Board-certified ophthalmologist, stated that there was a gradual decrease in appellant's vision from 1974 to October 1977 with an increase in subcapsular opacities especially in the left eye. In a November 16, 1977 report written to the employing establishment's regional flight surgeon, Dr. T. Lopez Colon, a general practitioner, stated that he performed annual physical examinations of appellant for the employing establishment since 1974, that appellant had been sent to a specialist for bilateral cataracts, that appellant was "developing difficulty of vision accompanied with intense headaches," and "This may be a job-related disease but you are the one to decide in this case. I do not believe that he can perform any ATC [air traffic control] activity." In a December 20, 1978 report Dr. Milton M. Zaret, a Board-certified ophthalmologist, stated that his November 30, 1978 examination showed capsular cataracts in both eyes, that the left eye was more advanced than the right, and "In my opinion, these were caused by your occupational exposure to radiant energy."

By a decision dated February 2, 1979 the Office rejected appellant's claim on the basis that he failed to provide evidence establishing that his disabling condition was causally related to factors of his employment.

Appellant requested a hearing, and submitted a March 1, 1979 report from Dr. Zaret. In this report Dr. Zaret diagnosed bilateral radiant energy cataracts, noted that he had performed cataract surgery on appellant's left eye on February 5, 1979 and that his best possible correction of refractive error was less than 20/70 in each eye under ordinary ambiance of illumination, and stated:

> "A reasoned medical opinion as to the relationship between the cataracts and the condition of employment as an air traffic controller. Air Traffic Controllers work with various electronic equipment including radars, radio broadcast, navigational aids, CRT's etc. so that spurious nonionizing radiations are an inher-

> ent part of their occupational environment. As all of the other known cataractogenic factors, such as disease, trauma, metabolic disorders, drug usuage, chemical intoxication, genetic affinity or senility, that might have been relatable to cataract formation were ruled out and because it is known that hertzian radiations are cataractogenic, it was therefore logical for his other physicians, such as Drs. Walter Kleis and T. Lopez Colon, to conclude that Mr. Hock's occupational exposure to hertzian radiation was responsible for the cataracts. In this regard, my findings of capsular cataracts confirmed their diagnosis.
>
> "In my opinion, based on medical reasonableness, Mr. Hock's cataracts were caused by his occupational exposure to nonionizing radiation.
>
> "Note: In my experience, Mr. Hock is not the first Air Traffic Controller whom I have examined and who exhibited hertzian radiation cataracts. Indeed, I have now confirmed this diagnosis in more than 10 Air Traffic Controllers. In the context of this specific type of cataract, such a large number of cases represents an epidemic. What is worse is that the condition is preventable and that early diagnosis could result in a reduction of the number of cases requiring surgery and in an extended time duration delay before surgical intervention became necessary for those cases that did ultimately require surgery. An additional factor, other than the health and safety of Air Traffic Controllers themselves, that should be of concern to the FAA, is the question of Air Traffic Safety which is compromised by the practice of providing waivers to Air Traffic Controllers who are developing cataracts."

An Office medical adviser reviewed the medical evidence on August 13, 1979 and stated that Dr. Zaret was a recognized authority in the field of cataracts and radiation exposure, that there was no basis to take exception to his report, and that if appellant's exposure could be confirmed he was entitled to a schedule award for loss of vision.

By a compensation order dated January 7, 1980 the Office vacated its February 2, 1979 decision rejecting appellant's claim; the Office determined that further development of the evidence was necessary on the issue of appellant's exposure to nonionizing radiation.

In response to a request for information on his employment and his exposure to ionizing and nonionizing radiation, appellant listed the equipment he operated, and set forth the history of his employment, which began in January 1968 and ended in February 1978 when his medical certificate was revoked. Appellant stated that his cataracts were first discovered on August 1, 1974, that he was temporarily disqualified for air traffic control duties on October 3, 1977, and that his disqualification was made permanent in February 1978. Appellant stated that he viewed the scopes from 18 inches, and that he was exposed for five to six hours each day, including when he was employed as a supervisor.

In response to a request for a review of appellant's statements on his exposure and for a report on his sources of exposure, an industrial hygienist of the Federal Aviation Administration stated in a November 9, 1982 report that radar controllers averaged four hours per day at the radar displays or scopes, that union agreements required position rotation every two hours at which time a break was usually taken, and that controllers usually occupied positions that placed their faces about 24 inches from the surfaces of the scopes. The industrial hygienist then described the emissions from the cathode ray tubes of the radar display equipment used by appellant, and the location and emissions of the VHF/UHF and remote microwave link antennae at the facilities at which appellant worked. The levels of emissions reported were based on studies of equipment at the Seattle Air Route Traffic Control Center, copies of which were attached. The industrial hygienist noted that periodic maintenance inspections were performed at all air traffic control facilities, and that air traffic control specialists worked in structures far removed from Federal Aviation Administration facilities that generate radio frequency radiation—the radar sites and radio beacon/communication sites, and that radar and communication information was transmitted to the air traffic controller by land telephone lines or microwave links "in much the same way that telephone and television signals are transmitted between cities."

The employing establishment also submitted copies of appellant's position description, and of the results of his annual physical examinations. These records show that bilateral cataracts were first diagnosed on August 1, 1974 by Dr. Kleis, that on June 10, 1976 and April 29, 1977 appellant's medical certificate was issued for air traffic control only as his vision was not correctable to 20/20, that on October 19, 1977 appellant was temporarily disqualified for active air traffic control duties based on an October 3, 1977 report from Dr. Kleis showing that appellant's cataracts had increased, and that appellant was permanently medically disqualified for air traffic control duties on February 1, 1978 due to his cataracts.

By a letter dated July 18, 1983 appellant's attorney submitted objections to the industrial hygienist's November 19, 1982 report, disputing the use of data from the Seattle Air Traffic Control Center at which appellant never worked and contending that the work practices described by the industrial hygienist were not actually in force in the facilities at which appellant worked. In a September 19, 1983 letter appellant's attorney requested participation in the selection of an impartial medical specialist, if one was needed.

In response to an Office request for comments on appellant's objections to his November 19, 1982 report, the Federal Aviation Administration's industrial hygienist stated that he could not refute appellant's statement regarding his contact with radar scopes, that the operating characteristics and radio frequency radiation measurements of the radar scopes obtained at the Seattle Air Traffic Control Center were "relevant to and representative of the same types of equipment used" by appellant, that operating frequencies and power settings were rigidly specified and monitored, that consequently emissions from radar scopes varied but slightly from unit to unit, that this slight variance was demonstrated in a study by the National Institute of Occupational Safety and Health at the Seattle Center, that some of the equipment appellant claimed to have operated was not in use where he worked, and that the methodology for estimating the levels of radio frequency radiation from sources exterior to the workplace, which he described, resulted in a "worse case" estimate which erred, if at all, on the high side.

The Office referred the case record and a statement of accepted facts to a panel consisting of Dr. Budd Appleton, Dr. George R. Merriam, Dr. Harold W. Skalka, who are Board-certified ophthalmologists, and Dr. Karl D. Straub, an internist. The statement of accepted facts incorporated appellant's estimates of the number of hours spent and the distances from which he viewed the radar scopes, and incorporated the industrial hygienist's estimates of the amount of radiation to which appellant was exposed.

In a report dated October 22, 1985 the panel noted that appellant "apparently had no difficulty with his eyes until his cataracts were discovered at age 32, a relatively young but by no means rare age for this condition to be diagnosed," and stated:

> "DISCUSSION: Mr. Hock has presented no evidence to support his claim that his cataracts were in any way related to his occupational environment at the FAA. The levels of nonionizing radiation to which he was occupationally exposed were miniscule as compared with those at which heat cataracts have been

created in experimental animals under unique conditions. There is no scientific evidence that cataracts in humans have ever been related to such low levels or that they could be. Nor is there any specific evidence to suggest that an unusual kind of special susceptibility to low levels of nonionizing radiation could exist. Indeed, all the scientific evidence to date, including surveys of large numbers of microwave workers, indicates that such cannot be the case. Consideration has been made of Mr. Hock's age when his cataracts were discovered and the fact that such cataracts are traditionally associated with a much later age of onset. In this connection it should be born in mind that in a recent study 26 percent of the population between age 40 and 50 were found to have posterior subcapsular opacities, much as Mr. Hock did.

"COMMENT: The Panel notes that the only apparent support for Mr. Hock's claim is the statement by Dr. Zaret that Mr. Hock's cataracts were caused by occupational exposure to electromagnetic energy. Dr. Zaret also states that Dr. Colon and Dr. Kleis (Mr. Hock's previous ophthalmologists) had come to same conclusion, but the record does not support that statement. The panel further ascribes no merit, scientific or otherwise, to Dr. Zaret's contentions that such miniscule exposures to microwave radiation as Mr. Hock's can cause cataracts. These claims by Dr. Zaret appear to be totally without factual support, and the panel rejects them completely as a basis for considering Mr. Hock's claim to have any merit.

"CONCLUSION: When someone as young as Mr. Hock develops cataracts, one is reluctant to ascribe them to natural occurrence until certain specific causes have been ruled out, such as diabetes, tetany, underlying dermatological conditions, metabolic disorders, etc. In the case of Mr. Hock not all such causes have been ruled out, but it does not appear likely the cause of his cataracts will ever be discovered. In any event, there is no basis for assuming they were caused by exposure to nonionizing radiation simply because some other specific cause has not been already identified. Because Mr. Hock's occupational exposure to nonionizing radiation was so miniscule it can not even be seriously considered as a possible cause."

By a letter dated December 16, 1985 the Office requested a supplemental opinion from Dr. Appleton whether appellant's exposure to ionizing, as opposed to nonionizing, radiation caused, aggravated, accelerated or precipitated appellant's cataracts. In a report dated February 14, 1986 Dr. Appleton stated that in none of the three cases reviewed by the panel did it "find information either in the statement of accepted facts or in the enclosed supporting work records or medical records to indicate there is any medically significant likelihood their cataracts were caused directly by ionizing radiation or that they were related to ionizing radiation by aggravation, acceleration or precipitation." Dr. Appleton continued that "the cause of most human cataracts must be carried within the individual's own genetic destiny, since most people who have cataracts are essentially no different from people of the same who don't have cataracts," and that there was a "tremendously variable range in the age of occurrence of those cataracts," with the usual age of onset in the fifties or later but with the appearance of cataracts of the same morphology and clinical appearance in patients in their forties, thirties, and once in a while in their twenties. Dr. Appleton concluded that cataracts were sometimes of unknown etiology, that they were known to occur in a limited number of metabolic diseases, and that there was not much evidence that the individuals considered by the panel had been adequately worked up for these diseases.

By a compensation order dated June 10, 1986 the Office found that the weight of the medical evidence negated a causal relation between appellant's cataracts and his exposure to radiation in the course of his employment.

Appellant requested a hearing which was held before an Office hearing representative on August 18, 1987. At this hearing appellant described his work environment, and testified that contrary to the industrial hygienist's estimate that UHF or VHF transmissions occurred about five percent of the time they actually continued almost the entire work day, that he never used one of the pieces of radar display equipment reported on by the industrial hygienist, that the rotation that occurred while working the radar scopes involved moving to another scope every two hours, that the periodic flight examinations performed for the employing establishment were comprehensive and included blood, gas and urine testing, and that these same kind of comprehensive studies were done in February 1979 when he was hospitalized for cataract surgery.

By a decision dated October 21, 1987 and made final on October 30, 1987 an Office hearing representative found that the weight of the medical evidence was represented by the detailed report of the panel of experts headed by Dr. Appleton, and that this evidence established that appellant's cataracts were not causally related to his exposure to radiation in his employment. The Office hearing representative further found that the opinion of Dr. Zaret was entitled to less probative value because it was based on incomplete exposure information and because it did not describe the pathological process involved, and that the information provided by the Federal Aviation Administration's industrial hygienist was the best available representation of appellant's exposure, absent other evidence on such exposure.

The Board finds that there is a conflict of medical opinion, necessitating referral to an impartial medical specialist pursuant to section 8123(a) of the Federal Employees' Compensation Act.[1]

Dr. Zaret, a Board-certified ophthalmologist and appellant's attending physician, concluded that appellant's cataracts were caused by his occupational exposure to nonionizing radiation. Dr. Zaret provided rationale for this opinion, explaining that it was known that hertzian radiations were cataractogenic, and that all the other known cataractogenic factors such as disease, trauma, metabolic disorders, drug usage, chemical intoxication, genetic affinity or senility had been ruled out. Dr. Zaret also noted that he had confirmed the diagnosis of hertzian radiation cataracts in more than ten air traffic controllers. An Office medical adviser noted that Dr. Zaret was a recognized authority in the field of radiation exposure and cataracts, a position corroborated by the submission of articles written for medical journals by Dr. Zaret on that subject.

On the other hand, the panel headed by Dr. Appleton concluded that appellant's cataracts were not related in any way to his exposure to nonionizing or ionizing radiation in his employment. The panel explained that the age of 32 at which appellant's cataracts were discovered was relatively young but "by no means rare" for the diagnosis of this condition, that the levels of nonionizing radiation to which appellant was exposed were "miniscule as compared with those at which heat cataracts have been created in experimental animals under unique conditions," that there was "no scientific evidence that cataracts in humans have ever been related to such low levels or that they could be," and that other causes such as diabetes, tetany, or metabolic disorders had not been adequately ruled out.

In order to resolve the conflict of medical opinion described above, the Office shall refer the case record and a statement of accepted facts[2] to an appropriate medical specialist for a reasoned opinion whether appellant's cataracts are causally related to his exposure to radiation in his employment. As appellant's attorney has requested participation in the selection of an impartial specialist, such participation shall be permitted in accordance with the provisions of the Office's procedure manual.[3] After such further development as it deems necessary, the Office shall issue a *de novo* decision.

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[1] 5 U.S.C. section 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[2] The Board does not find that the statement of accepted facts used by the Office contains the inaccuracies alleged by appellant's attorney. Appellant's attorney has presented no evidence in support of her contentions that the levels of exposure described by the Federal Aviation Administration's industrial hygienist were not representative of those encountered by appellant.

The decision of the Office of Workers' Compensation Programs dated October 21, 1987 and made final on October 30, 1987 is set aside and the case remanded to the Office for further action in accordance with this decision of the Board.

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[3] Federal (FECA) Procedure Manual, Chapter 3-400, Examinations, Treatment, and Related Services, paragraph 3(a) (October 1978); *See Leonard Lothlen*, 37 ECAB 314 (1986)

In the Matter of VELTA H. MIKELSONS *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Minneapolis, Minn.

Docket No. 88-326; Submitted on the Record;
Issued August 31, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof in establishing that appellant did not have any disability causally related to her October 7, 1974 and November 19, 1976 employment injuries after December 12, 1980, the date the Office terminated her compensation benefits; and (2) whether appellant has met her burden of proof in establishing that her bilateral carpal tunnel syndrome is causally related to factors of her federal employment.

On October 8, 1974, appellant, then a 48-year-old psychiatrist, filed a notice of traumatic injury alleging that on October 7, 1974 she strained her back when assisting a patient who was having a seizure and that such incident resulted in pain to her cervical area, left shoulder, thoracic and lumbar spine with pain radiating to her left leg. The record indicates that the Office of Workers' Compensation Programs accepted appellant's claim for "lumbar strain" but that no compensation for wage loss was paid because appellant claimed no immediate lost time from work as a result of this injury.

On July 28, 1976, appellant filed a recurrence of disability claim alleging that on that date she experienced back problems causally related to her October 7, 1974 employment injury. Appellant commenced working only four hours a day following this alleged recurrence of disability. The record indicates that the Office did not accept appellant's July 28, 1976 recurrence of disability claim.

On November 22, 1976, appellant filed a notice of traumatic injury alleging that on November 19, 1976 she sprained her back and neck at work when the chair on which she was sitting fell backwards. The record indicates that appellant stopped work on December 4, 1976 and did not return. Based on medical reports of appellant's physicians Dr. Andrew M. Steiner, Board-certified in physical medicine and rehabilitation, and Dr. Henry Horecki, an internist, who diagnosed cervical spine injury with nerve root irritation, radiculitis, the Office accepted appellant's claim for this condition and authorized payment of continuation of pay for her lost time from work commencing December 4, 1976 to January 17, 1977 followed by payment of compensation for temporary total disability for her continued disability, and placement on the automatic compensation rolls effective March 28, 1977.

By letter dated February 14, 1978, appellant advised the Office that she was scheduled for surgery to correct her bilateral carpal tunnel syndrome which she believed resulted from prolonged pain in her neck and muscular weakness, conditions she alleged were caused by her accepted employment injuries. In support of her statement, appellant submitted the March 28, 1978 report of Dr. Harry M. Rogers, a Board-certified neurosurgeon, who stated that he examined appellant on January 5, 1978 at the request of Dr. Horecki, noted that her medical history included "a couple of injuries resulting in neck injury" which "involves pain in her neck and arms and numbness and tingling in her fingers," found that a January 4, 1978 electromyogram confirmed bilateral carpal tunnel syndrome and performed surgery for release of left carpal tunnel ligament on February 23, 1978 which he stated would be followed by a similar procedure for appellant's right hand at a later date.

Appellant subsequently submitted the April 28, 1978 report of Dr. Horecki who recounted appellant's medical history which included the following nonemployment-related injuries: in November 1972 appellant sustained a neck injury when a patient ran her off the road and her car landed in a ditch; in November 1973 she sustained a compression fracture of T-7, T-8 and a soft tissue injury to her neck in an automobile accident; in May 1974, she injured her neck in an automobile accident but "apparently was not treated for this injury;" and in June 1976 she was hospitalized for hypertension. Dr. Horecki concluded his report as follows:

> "In view of the extent of the injury sustained to the cervical and lumbar spine, the poor response to therapy and the length of time since the first injury, the prognosis as to the possibility of returning to full-time employment is rather uncertain. The patient was advised to work less than four hours a day."

At the request of the Office, an Office medical adviser reviewed the reports of Drs. Rogers and Horecki and in a report dated June 16, 1978, stated that he could not causally relate appellant's bilateral carpal tunnel syndrome to her accepted employment injuries or her employment. With respect to appellant's disability due to her accepted injury the Office medical adviser noted that the recent medical reports submitted by appellant's physicians focused on appellant's carpal tunnel syndrome and the disability related thereto and, therefore, he believed it reasonable to expect that appellant had recovered from her November 19, 1976 back injury.

By letter dated September 14, 1978, which incorporated a statement of accepted facts, the Office requested that appellant's physician, Dr. Steiner, examine appellant and provide an opinion on whether he believed her continued disability was causally related to her accepted employment injuries.[1] Dr. Steiner examined appellant on October 12, 1978 and in a report of the same date, reviewed appellant's medical history, which differed slightly from that presented by Dr. Horecki in his April 28, 1978 report with respect to appellant's nonemployment injuries,[2] disclosed findings upon physical examination noting that appellant suffers primarily from neck discomfort, reported that December 5, 1976 x-rays of appellant's cervical spine were within normal limits and x-rays of her lumbosacral spine taken on the same date showed minimal osteoarthritic changes in the lumbar area as had June 5, 1976 x-rays, and stated that he believed appellant's chief neck injury resulted from her 1974 automobile accident in which her car landed in a ditch finding that her severe posterior neck pain problems date back to that incident but believed her severe lumbar difficulty developed following her October 7, 1974 employment injury. Dr. Steiner stated that he believed the November 19, 1976 employment injury temporarily aggravated a previous condition but the aggravation lasted only a few months. Dr. Steiner diagnosed contusion and myofascial strain of the spine in the cervical and lumbar regions with probable degree of disc injury, estimated that appellant had sustained a 30 percent permanent partial impairment of her spine due to her accepted employment injuries but concluded that she was capable of working four hours a day provided the work day was divided into two hour increments with a rest break in between and that her employment activity did not involve any pulling, pushing, reaching or bending and that sitting was limited to no more than one hour at a time.

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[1] The record indicates that the Office initially requested Dr. Rogers to perform appellant's examination but he declined and suggested she undergo examination by Dr. Steiner.

[2] Dr. Steiner stated that appellant first sustained injuries to her neck and back in a 1963 automobile accident whereas Dr. Horecki reported that appellant's first neck and back injuries occurred in a November 1972 automobile accident. Dr. Steiner stated that appellant was involved in two automobile accidents in 1974 whereas Dr. Horecki only recounted one automobile accident in 1974.

An Office medical adviser reviewed Dr. Steiner's report and on the basis of the doctor's statement that appellant's November 19, 1976 employment injury would have resolved within a few months concluded that appellant's continued disability was due to her osteoarthritis and found her capable of "varied sedentary" work on a full-time basis.

By letter dated August 27, 1979, the Office advised appellant that the medical evidence of record established that the residuals of her employment injuries had sufficiently subsided so that she was no longer disabled for her regular employment and that it proposed to terminate her compensation benefits effective September 13, 1979. The Office advised appellant that if she disagreed with the proposed action she may submit a claim for continuing compensation on account of employment-related disability accompanied by supportive medical evidence.

By letter dated September 5, 1979, appellant protested the proposed termination of her compensation benefits, recited the history of her employment and nonemployment injuries, and claimed that as a result of these injuries she was still disabled for work. By letter dated December 12, 1979 the Office clarified for appellant that its decision to terminate her compensation benefits was based not on a finding that she had no disability but rather that the medical evidence of record no longer supported disability due to residuals of her accepted employment injuries. The Office informed appellant that the medical evidence indicated that her continued disability was due to her nonemployment-related osteoarthritis. The Office advised appellant that it would hold the record open for ninety days to allow her an opportunity to submit a claim for continuing compensation accompanied by supportive medical evidence.

In response to this letter, appellant submitted a claim for continuing compensation on account of disability (Form CA-8) dated January 24, 1980 on which she claimed compensation effective August 1979 and submitted the December 27, 1979 report of Dr. Horecki who stated that he examined appellant on that date and that x-rays of her lumbosacral spine were negative, x-rays of the cervical spine "showed mild osteoarthritic changes which are related to age" but that physical examination revealed very severe spasm of the posterior cervical spine with the spasm more pronounced on her left side. Dr. Horecki stated that appellant was unable to perform any kind of work, "even to function as a psychiatrist in her own home" and concluded his report noting the dates of her two accepted employment injuries but rendered no statement on causal relationship. Appellant also submitted the February 29, 1980 report of Dr. Steiner who reiterated his belief that appellant has a 30 percent permanent partial impairment of the spine due to her employment-related injuries and repeated appellant's work tolerance limitations. Dr. Steiner stated that it was his opinion that appellant's lower back difficulties developed gradually following her October 7, 1974 employment injury and that she continues to have muscle spasm and diminished range of motion in the cervical region and in the lower back region.

On June 12, 1980, a second Office medical adviser reviewed the medical evidence of record and reported that he found appellant's symptoms to be out of proportion to objective findings and further found that the medical evidence indicated a significant emotional component in appellant's case. The Office medical adviser recommended that appellant be referred for independent orthopedic, neurological and psychiatric examination by appropriate specialists to be followed by further review by an Office medical adviser upon receipt of this information.

On August 13, 1980, the Office referred appellant for examination and evaluation by Dr. Paul Melichar, a Board-certified psychiatrist, and Dr. V. Richard Zarling, a Board-certified neurologist, together with her case record and a statement of accepted facts furnished by the Office which included a description of appellant's employment-related injuries but not the conditions for which these injuries were accepted.

Dr. Zarling examined appellant on November 21, 1980 and December 12, 1980 and set forth his findings and conclusions in a report dated October 15, 1981[3] which included a review of the medical evidence of record, a radiological report of Dr. Robert S. Lund, a Board-certified radiologist, on x-rays performed on November 21, 1980, detailed notes on his findings on physical examination, and detailed notes on appellant's medical history which included a review of medical records maintained at The Minneapolis Clinic with which Dr. Zarling is associated and where appellant was treated from 1958 to December 1973 for various conditions and injuries. In his review of the medical evidence, Dr. Zarling stated that appellant "had some sort of back injury while restraining a convulsing patient in 1974." In the November 21, 1980 radiological report, Dr. Lund disclosed that with respect to the cervical spine, the x-rays showed normal appearance with no significant degenerative changes apparent and no evidence of fracture or dislocation; with respect to the thoracic spine, the x-rays showed evidence of mild right scoliosis measuring seven degrees between the pedicles of T-1 and supervisor plate of T-12 with mild degenerative changes present with some generalized demineralization; and with respect to the lumbar spine, the x-rays showed a seven degree left convexity scoliosis measured between the superior plate of T-12 and superior plate of L-5 but no evidence of fracture or wedging, no apparent significant degenerative changes but some widening of the superior portion of the sacroiliac joints bilaterally being slightly prominent on the left and described by Dr. Lund as "probably developmental." Dr. Zarling noted that a November 26, 1980 electromyogram was compatible with a diagnosis of right carpal tunnel syndrome.

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[3] The record indicates that Dr. Zarling delayed sending his report to the Office but the record does not indicate the reason for the delay.

Dr. Zarling reported that neurologic examination showed only some tenderness of the left neck, limitation of back movement but no limitation of neck movement, summarized the neurological examination as negative with the exception of tenderness of the left neck and diagnosed "chronic neck and low back pain without evidence of peripheral nerve involvement" and stated that appellant was neither totally nor partially disabled for work due to her November 19, 1976 employment injury. He stated that the medical evidence of record revealed no "objective evidence of a true radiculitis" but contained objective evidence of bilateral carpal tunnel syndrome which he found unrelated to her accepted employment injuries. Dr. Zarling concurred with Dr. Steiner's opinion that the November 1976 employment injury temporarily aggravated a preexisting musculoligamentous strain which aggravation, he stated, ceased by October 1978 and found that "probably less than five percent of appellant's chronic pain syndrome is related to her November 19, 1976 employment injury." Dr. Zarling concluded with the opinion that there is a strong psychological element in appellant's case and enclosed with his report an October 15, 1981 work restriction evaluation form setting forth appellant's work tolerance limitations and indicating that appellant could work an eight-hour day subject to the restrictions noted.

The record indicates that appellant failed to keep her appointment with Dr. Melichar. The record further indicates that a third Office medical adviser reviewed Dr. Zarling's report and concurred with his conclusions.

By letter dated October 15, 1982, appellant advised the Office that on September 16, 1982 she underwent surgery for release of carpal tunnel of her right hand and alleged that her bilateral carpal tunnel syndrome was causally related to her employment in which frequent heavy lifting was part of her duties. In support of her allegation, appellant submitted a December 15, 1982 report and a January 12, 1983 report of Dr. James H. Dobyns, an orthopedic surgeon. In his December 1982 report, Dr. Dobyns stated that appellant's bilateral carpal tunnel syndrome is historically related to "her experiences while working as a psychiatrist [at the employing establishment] and is associated with episodes of presumed trauma from lifting and supporting heavy patients, receiving shock therapy, and multiple automobile accidents." In this report Dr. Dobyns also noted that appellant had developed a private psychiatric practice at home working approximately a four-hour day divided into two hours in the morning and two hours in the afternoon.

By letter dated February 14, 1983 the Office advised appellant that her carpal tunnel syndrome had not been accepted as causally related to her two accepted employment injuries and that if she believed this condition was employment related she should file, through her employing establishment, the requisite occupational disease claim.

By compensation order dated July 22, 1983 which incorporated a memorandum summarizing the evidence the Office denied appellant's claim for continuing compensation finding that her disability subsequent to September 13, 1979, the date the Office terminated her compensation benefits, was not causally related to her accepted employment injuries. The Office found that the weight of the medical evidence rested with the report of Dr. Zarling, referred to as an impartial medical specialist selected to resolve the conflict in medical opinion between Dr. Steiner and the Office medical adviser, on the issue of causal relationship between appellant's continued disability and her accepted employment injuries. The Office noted that although Dr. Zarling and the Office medical adviser felt that there may be a psychological element to appellant's disability, resulting from both employment and nonemployment-related injuries, appellant failed to submit to psychiatric examination and therefore no medical determination could be made on this issue.

By letter dated August 10, 1983 appellant requested a hearing on her case and a hearing was scheduled for March 20, 1983. Prior to the hearing, appellant's authorized counsel submitted a detailed memorandum in support of her claim contending that appellant's employment-related disability had not ceased, that the Office failed to meet its burden of proof in terminating her benefits and alleging that the medical examination by Dr. Zarling was incomplete and inadequate. Appellant also submitted at this time her complete records from the Metropolitan Medical Center at which appellant sought treatment for her spinal problems. The records contain handwritten treatment notes of several physicians, results of various laboratory tests and two narrative reports of Dr. Leonard A. Titrud, a Board-certified neurosurgeon. In his December 17, 1981 narrative report, Dr. Titrud reviewed appellant's medical history, disclosed findings upon neurological examination and stated that appellant "certainly has the effects of having had a cervical, thoracic and lumbosacral contusion and straining type of injury which is still very symptomatic for her" and recommended a "lumbar computerized axial tomography [CAT] scan" but did not identify the injury which he believed would have resulted in this contusion. In his May 24, 1983 report, Dr. Titrud disclosed findings upon more recent examination but rendered no statement on causal relationship. Appellant also submitted a March 8, 1984 report of Dr. Titrud which disclosed findings upon recent examination and opined that appellant had a 35 percent permanent partial disability of the entire spine and a 15 percent permanent partial disability of both upper extremities, particularly, her hands and wrist areas but rendered no statement on causal relationship. Appellant also submitted a February 29, 1984 report of Dr. Thomas F. Varecka, a Board-certified orthopedic surgeon, which addressed appellant's carpal tunnel syndrome, noting that residual problems in her hands and wrists are compatible with a post carpal tunnel situation and stated that appellant should avoid all repetitious use of her hands but rendered no statement on causal relationship.

At the hearing held on March 20, 1984, appellant's counsel requested cross-examination of Dr. Zarling and the Office granted this request and rescheduled the hearing for August 27, 1984. At the hearing held on August 27, 1984, appellant testified as to the history of her employment and nonemployment injuries and Dr.

Zarling testified as to his examination of appellant in 1980 and his findings and conclusions related thereto. In response to questions posed by appellant's counsel, Dr. Zarling affirmed that it was his opinion that appellant's complaints of neck pain were consistent with the kind of employment injuries she sustained on October 7, 1974 and November 19, 1976, that some part of appellant's chronic pain syndrome was attributable to her accepted employment injuries, that chronic pain can be disabling, and that appellant's chronic pain disabled her for her regular private psychiatric practice. Additionally, Dr. Zarling acknowledged: that he did not pursue with Dr. Lund the x-ray finding, as reported by Dr. Lund, of a developmental abnormality of a right scoliosis in appellant's thoracic spine and left scoliosis in appellant's lumbar spine; that he found it more difficult to evaluate appellant's problem because appellant is a physician; that on November 21, 1980 he performed an abbreviated physical examination of appellant with respect to areas for which she had no complaints of pain but testified that he performed a thorough physical with respect to her areas of complaints; and that on December 12, 1980, he "did not do an appropriate examination for the symptoms" of which she complained. With respect to appellant's complaints of low back pain, Dr. Zarling confirmed that at his examination of December 12, 1980 he did not do a full range of motion examination.

By decision dated February 25, 1985 and finalized on March 1, 1985 the Office hearing representative amended the Office's decision of July 22, 1983 finding that the medical evidence established that appellant's disability ceased on December 12, 1980, the date of Dr. Zarling's final examination of appellant, and not on September 13, 1979 and therefore found that appellant was entitled to compensation benefits through December 12, 1980. The Office hearing representative found that it was improper for the Office to have terminated appellant's benefits as of September 13, 1979 because at that time appellant's physician continuously stated that she could only work on a part-time basis and that this issue was not resolved until Dr. Zarling's examination. The Office hearing representative found that Dr. Zarling's report sufficiently negated causal relationship between appellant's continued disability and her accepted employment injuries. The Office hearing representative further found that appellant's carpal tunnel syndrome was not related to her employment injuries and noted that appellant made no mention of wrist injuries at the time of either of her two employment injuries and that she had never filed a claim for this condition.

By letter dated February 25, 1986 appellant requested reconsideration of her claim and in support of her request submitted the October 18, 1984 report of Dr. Varecka which principally addressed the issue of appellant's carpal tunnel syndrome and stated in relevant part as follows:

> "The description of the injuries which [appellant] sustained could certainly be anticipated and expected to put a great deal of momentary stress and strain on such supporting structures as the spinal column and the shoulders. As far as her wrists are concerned, the development of carpal tunnel syndrome, as you are probably aware is a multifactorial situation. Except in certain unusual circumstances can one isolated event ever be felt to be the only or major cause of a carpal tunnel syndrome. Certainly the traumatic episodes can play a contributing part in the development of carpal tunnel syndrome but, except as noted above, only rarely could such a traumatic episode, such as that sustained by [appellant] be considered the sole provocative event. Therefore, the injury episodes which [appellant] has related to me could be considered to be contributing factors to the development of her carpal tunnel syndrome and the subsequent follow-up problems which she has had."

Appellant also submitted the April 15, 1986 report of Dr. Horecki who stated that appellant's condition had not improved and was becoming worse due to muscle atrophy. Appellant also submitted the April 18, 1986 report of Dr. Steiner who disclosed findings upon recent examination of appellant and stated that he believed her current problems are due to her October 7, 1974 and November 19, 1976 employment injuries.

By compensation order dated September 16, 1986 which incorporated a memorandum summarizing the evidence the Office reviewed appellant's claim on the merits under 5 U.S.C. section 8128 and denied modification of its prior decision of March 1, 1985 on the basis that the evidence submitted by appellant in support of reconsideration was insufficient to warrant modification of the prior decision. The Office found that the reports of Drs. Horecki and Steiner supporting continued employment-related disability were insufficient to overcome the weight of Dr. Zarling's report. The Office also found that the medical evidence submitted by appellant with respect to her carpal tunnel syndrome was insufficient to establish an employment relationship.

By letter dated July 16, 1987, appellant requested reconsideration and submitted the December 31, 1986 report of Dr. Steiner who corrected prior reports with respect to dates given for appellant's nonemployment-related injuries. Appellant also submitted the October 20, 1986 report of a CAT scan of her lumbar spine, the results of which were reported as showing "moderate bulge of the 3-4 and 4-5 disc posteriorly." An Office medical adviser reviewed these reports and in a report dated May 19, 1987 found them insufficient to support appellant's claim of continuing employment-related disability.

By compensation order dated August 26, 1987 which incorporated a memorandum summarizing the evidence the Office reviewed appellant's claim on the merits under 5 U.S.C. section 8128 and denied modification of its prior order of March 1, 1985 on the basis that the evidence submitted by appellant in support of reconsideration was insufficient to warrant modification of the prior order. The Office noted that the December 31, 1986 report of Dr. Steiner failed to provide an opinion supported by medical rationale explaining a causal relationship between appellant's disability subsequent to December 12, 1980 and her accepted employment injuries.

The Board finds that the Office of Workers' Compensation Programs has not met its burden of proof in establishing that appellant's disability causally related to her October 7, 1974 and November 19, 1976 employment injuries ceased by December 12, 1980, the date it terminated her compensation benefits.

Once the Office of Workers' Compensation Programs accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without first establishing that the disability has ceased or that it is no longer related to the employment.[4] The Office has failed to establish that appellant's continued disability is no longer employment related.

In the instant case, the Office relied on the October 15, 1981 report of Dr. Zarling, a Board-certified neurologist, who examined and evaluated appellant for disability purposes on November 21, 1980 and December 12, 1980, as supporting its determination that appellant's continued disability was no longer employment related and justifying termination of appellant's compensation benefits. This report is insufficient to discharge the Office's burden of proof.

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[4] *Edwin L. Lester,* 34 ECAB 1807 (1983).

The Office refers to Dr. Zarling as an impartial medical specialist asked to resolve a conflict in medical opinion between appellant's physician, Dr. Steiner, Board-certified in physical medicine and rehabilitation, and the Office medical adviser. However, the evidence of record indicates that Dr. Zarling did not serve as an impartial medical specialist in the instant case. Although the evidence of record indicates that prior to the Office's letter of August 27, 1979, by which it proposed to terminate appellant's compensation benefits, there was a conflict in medical opinion between Dr. Steiner and the Office medical adviser who first reviewed appellant's case, on the issue of whether appellant was totally or partially disabled for work, the record does not indicate that the Office noted, or sought resolution of, that conflict in medical opinion. The record indicates that the Office intended to rely on the opinion of the Office medical adviser that appellant was capable of full-time employment and then proceed to terminate her compensation benefits unless appellant submitted a claim for continuing compensation accompanied by supportive medical evidence. In response to the notification of proposed termination of benefits, appellant submitted the requisite claim and additional medical evidence. Upon review of the evidence, a second Office medical adviser found that appellant's symptoms were out of proportion to the objective findings noted in the reports, proffered that there was an emotional component to her case and recommended that appellant be referred to orthopedic, neurologic and psychiatric specialists in order to determine the status of her disability. This opinion of the second Office medical adviser is not sufficient to create a conflict in medical opinion.[5] Additionally, there is no indication from the record that the Office in referring appellant to Dr. Zarling followed its established procedures for selection of an impartial medical specialist.[6] Accordingly, the record indicates that Dr. Zarling served as an Office referral physician, selected pursuant to the recommendation of the Office medical adviser and did not serve as an impartial medical specialist and, therefore, his report is not accorded special weight.[7]

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[5] *See Amanda G. Lupone*, 34 ECAB 1045 (1983); *See also Ann E. Taylor*, Docket No. 87-511 (issued June 12, 1987).

[6] *See* Federal (FECA) Procedure Manual, Chapter 3-400, Part 5. Note also that a physician is not qualifed to serve as an impartial medical specialist if, *inter alia*, the physician was an associate of a physician who had previously examined the claimant. *See Raymond E. Heathcock*, 32 ECAB 2004 (1981). The record indicates that Dr. Zarling was associated with a medical clinic at which appellant was a patient for approximately twenty years.

[7] In situations where a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight. *See James P. Roberts*, 31 ECAB 1010 (1980).

The Board finds that the report of Dr. Zarling is deficient in several respects and is, therefore, of diminished probative value. In his October 15, 1981 report, Dr. Zarling states that "appellant had some sort of back injury [in October 1974] while restraining a convulsing patient." There should not have been any uncertainty in Dr. Zarling's report as to the nature of the injury sustained by appellant, and accepted by the Office, with respect to her October 1974 employment injury. The Board notes, however, that the condition for which this injury was accepted was not set forth in the statement of accepted facts furnished to Dr. Zarling by the Office and this omission coupled with Dr. Zarling's statement querying the nature of the October 1974 injury diminishes the probative value of the conclusions drawn with respect to this employment injury.

In his report, Dr. Zarling stated that the residuals of appellant's November 19, 1976 employment injury resolved by October 1978 but also stated in this same report that appellant's "chronic pain syndrome," is related, albeit less than five percent, to her November 1976 employment injury and failed to clarify the contradiction presented by these two statements. Dr. Zarling also stated that appellant was neither totally nor partially disabled due to her November 1976 employment injury but failed to address whether appellant is disabled to any extent due to her October 1974 employment injury which Dr. Steiner found to be the more significant of the two accepted employment injuries.

At the hearing held on August 27, 1984, Dr. Zarling, through his testimony contradicted additional statements set forth in his October 15, 1981 report. Dr. Zarling acknowledged that appellant's complaints of neck pain, given to him at the time of his examination of her, were consistent with the description of her accepted employment injuries, that her chronic pain syndrome is both disabling and attributable to her accepted employment injuries and that her chronic pain disabled her for work in private psychiatric practice. Dr. Zarling further acknowledged that he did not perform the appropriate examination of appellant, given her complaints, on December 12, 1980. The record indicates that no attempt was made by the Office to resolve or clarify the inconsistencies between Dr. Zarling's oral testimony and his written report of October 15, 1981 either at, or subsequent to, the hearing. Accordingly, given his testimony at the hearing which indicates an inadequate examination of appellant and that appellant continues to suffer from employment-related disability, the October 15, 1981 report of Dr. Zarling is of diminished probative value and insufficient to discharge the Office's burden of proof.

The Board finds that appellant has not met her burden of proof in establishing that her bilateral carpal tunnel syndrome is causally related to factors of her federal employment.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that her condition was caused or adversely affected by her employment.[8] This burden includes the necessity of furnishing rationalized medical opinion evidence showing a causal relationship between appellant's condition and factors of employment which is based upon a proper factual and medical background and a specific and accurate history of employment incidents or factors which are alleged to have caused or exacerbated the disability.[9]

Appellant has submitted voluminous medical reports supporting that she has bilateral carpal tunnel syndrome. The issue, however, is not whether appellant has this condition, the medical evidence of record clearly establishes that she does, but whether this condition is causally related to factors of her federal employment. Although several physicians have stated that this condition is causally related to appellant's employment or her employment injuries, none has provided a reasoned medical opinion explaining how this condition developed from the employment and/or her employment injuries. Dr. Dobyns, an orthopedic surgeon, stated in his December 15, 1982 report that appellant's bilateral carpal tunnel syndrome was related to her employment which included episodes of trauma, lifting and supporting heavy patients and automobile accidents but failed to explain, using medical terminology, how these events and factors contributed to the development of her bilateral carpal tunnel syndrome. Dr. Varecka, a Board-certified orthopedic surgeon, stated in his October 1984 report that the traumatic injuries sustained by appellant "can play a contributing part in the development of carpal tunnel syndrome" and "could be considered to be contributing factors to the development of this condition." However, as Dr. Dobyns before him, Dr. Varecka failed to explain, using medical rationale, how appellant's traumatic episodes contributed to the development of carpal tunnel syndrome. Dr. Varecka's report is speculative on the issue of causal relationship and addresses a general situation and not the specifics of appellant's employment injuries and is therefore of diminished probative value.

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[8] *Birger Areskog*, 30 ECAB 571 (1979).

[9] *William Nimitz, Jr.*, 30 ECAB 567 (1979).

An award of compensation may not be based on surmise, conjecture or speculation.[10] The Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[11] Neither the fact that the disease or condition became apparent during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[12] The Board has also found that medical opinions of general application, not addressing the particular circumstances of a claimant's claim, are insufficient to establish causal relationship.[13]

The decision of the Office of Workers' Compensation Programs dated August 28, 1987 is hereby reversed as to the Office's finding that appellant's employment-related disability ceased by December 12, 1980 and affirmed as to the finding that appellant has not discharged her burden of proof in establishing that her bilateral carpal tunnel syndrome is employment related and is not entitled to compensation benefits for disability or treatment related to this condition.

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[10] *Id.*

[11] *Birger Areskog* note 8 *supra.*

[12] *Lillian M. Jones,* 34 ECAB 379 (1982).

[13] *See William J. Murray,* 35 ECAB 606 (1984); *Gerald L. Taylor,* 30 ECAB 1401 (1970).

In the Matter of GRADY M. STALLWORTH *and* DEPARTMENT OF THE NAVY, PUBLIC WORKS CENTER, Pensacola, Fla.

Docket No. 88-81, September 13, 1988

ORDER GRANTING PETITION FOR RECONSIDERATION AND MODIFICATION OF PRIOR DECISION

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of $13,958.75 occurred; (2) whether the Office properly determined that appellant was without fault in the creation of the overpayment and that therefore waiver of repayment was possible; (3) whether the Office abused its discretion in refusing to waive the overpayment; and (4) whether the Office properly required repayment of at the rate of $400.00 per month.

The Board issued its decision and order in the above-entitled matter on June 10, 1988. On June 30, 1988 the Director of the Office of Worker's Compensation Programs filed a petition for reconsideration contending that the Board's June 10, 1988 decision contained an error of law. The Director contended that the Board confused salary offset under 29 C.F.R. Part 20 with administrative offset under 29 C.F.R. Part 20, and incorrectly cited to 29 C.F.R. Part 18 as relating to administrative offset and salary offset under the Debt Collection Act of 1982, rather than as relating to the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges. The Director specifically objects to the language of paragraph 4 on page 5 of the decision which states as follows:

> "The Board notes that decisions made by the Office pursuant to the Debt Collection Act are reviewable by the Office of the Administrative Law Judge under 29 C.F.R. Part 18. For this reason the Board does not have jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act as this involves an offset against the 'salary' of a federal employee or benefits recipient as opposed to recovery made against continuing FECA benefits of an employee or authorized benefits recipient.
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> "The Board, therefore, finds that with regard to the method of recovery under 29 C.F.R. Part 18, it does not have jurisdiction to consider the matter as the Board's jurisdiction is limited to appeals from final decisions of the Office arising under the Federal Employees' Compensation Act."

Appellant was served with a copy of the Director's Petition with a reply due July 25, 1988. No reply was forthcoming.

The Board has carefully considered the matter and concludes that although the misstated law appears as dicta in the decision pursuant to the Debt Collection Act, correction is warranted to avoid confusion on the issue and to preclude the appellant from being given the erroneous impression that he is entitled to an opportunity for an Office of Administrative Law Judges hearing when the Office seeks to recover a debt through administrative offset, and therefore concludes that the petition should be granted and the Board's June 10, 1988 decision should be modified as follows: the fourth paragraph of page five and the first paragraph on page six are hereby deleted and replaced with the following paragraphs:

> "The Board notes that decisions regarding salary offsets made by the Office pursuant to the Debt Collection Act are reviewable by the Office of the Administrative Law Judge under 29 C.F.R. sections 20.74 through 20.90, and specifically section 20.78(b)(7), and that decisions regarding administrative offsets made by the Office pursuant to the Debt Collection Act are not subject to such hearing, but may be reviewed by the Office upon written request in accordance with 29 C.F.R. sections 20.29 through 20.37, and specifically section 20.25. For this reason the Board does not have jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act as this involves an offset against the 'salary' of a federal employee or benefits recipient as opposed to recovery made against continuing FECA benefits of an employee or authorized benefits recipient.
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> "The Board, therefore, finds that with regard to the method of recovery under 29 C.F.R. Part 20, it does not have jurisdiction to consider the matter as the Board's jurisdiction is limited to appeals from final decisions of the Office arising under the Federal Employees' Compensation Act."

IT IS ORDERED that the petition for reconsideration be granted; the decision of the Board dated June 10, 1988 is hereby affirmed as modified.

In the Matter of PHILIP J. DEROO *and* U.S. POSTAL SERVICE, POST OFFICE, Boston, Mass.

Docket No. 88-538; Submitted on the Record;
Issued September 8, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issues are: (1) whether appellant has met his burden of proof in establishing that his cervical radiculitis is causally related to factors of his federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. section 8128 constituted an abuse of discretion.

On May 15, 1987, appellant, a 50-year-old maintenance electrician, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that his cervical radiculitis, of which he first became aware on or about December 8, 1986, is causally related to factors of his federal employment. Appellant's Form CA-2 indicates that he stopped work on December 9, 1986.

In support of his claim, appellant submitted a personal statement describing several of his duties, and the manner in which such duties were performed, which he believed contributed to the development of his condition. Appellant stated that as a maintenance electrician he must frequently hold his head back and keep it in such position in order to look at overhead wiring and while installing and removing electrical and mechanical components and fixtures. Appellant stated that his duties also require him to climb up and down ladders while carrying heavy electrical equipment and to transfer heavy electrical and mechanical equipment to and from his truck. Appellant subsequently submitted a second personal statement in which he described the onset of his condition, stating that on December 8, 1986 he experienced chest pains and pain in his right arm and loss of sensation in the fingertips in his right hand and initially believed that he had contracted the flu. He stated that he was first examined by his physician, Dr. David E. Brown, an internist, who diagnosed appellant's condition as a pinched nerve/cervical radiculitis and referred appellant to Dr. Sherwin H. Ritter, a Board-certified orthopedic surgeon, and to Dr. E. Edward Kornel, a neurosurgeon, for further examination and treatment.

Appellant submitted in support of his claim several reports of Drs. Brown, Ritter, and Kornell as well as his hospital records from Salem Hospital for the period January 13, 1987 to February 3, 1987. The medical reports and records submitted by appellant disclosed the physicians' findings upon examination including results of laboratory tests, x-ray examination, a computed tomography scan and cervical myelogram performed on January 20, 1987, documented treatment rendered, including an anterior cervical disectomy C6-7 performed by Dr. Kornel on January 31, 1987 and reported on appellant's postoperative progress. These reports also gave a diagnosis of cervical disc disease in addition to the initial diagnosis of cervical radiculopathy. Of these medical reports, the only report to address the issue of causal relationship between appellant's condition and factors of his federal employment was an April 6, 1987 report of Dr. Kornel which stated as follows:

> "I have reviewed [appellant's] job description. The type of work that he has been performing for years could certainly result in degenerative cervical disc disease of the type that [appellant] is suffering from and for which he required surgery. I feel that it is very likely that his job resulted in his cervical disease."

By letter dated August 26, 1987, the Office of Workers' Compensation Programs advised appellant that it noted that his physician, Dr. Kornel, supported causal relationship but that to further process his claim it required a well-rationalized medical explanation from Dr. Kornel as to why he believes appellant's cervical condition is causally related to factors of his federal employment. The Office requested that appellant submit such additional medical evidence within 21 days from the date of the letter.

Appellant subsequently submitted an August 28, 1987 report of Dr. Kornel which stated as follows:

> "The job description that I have pertaining to [appellant] states that he has to do frequent climbing up and down ladders, looking up, working on ceilings and overhead fixtures and carry relatively heavy materials overhead. This is a job that went on for many years and this type of activity with constant head bending and constant loading has a high probability of causing degenerative cervical disc and joint disease."

By compensation order dated September 29, 1987, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim for compensation on the basis that the medical evidence failed to establish a causal relationship between the condition for which he claimed compensation and factors of his federal employment.

By letter dated October 5, 1987 appellant requested reconsideration of his claim and in support of his request he resubmitted the August 28, 1987 report of Dr. Kornel.

By compensation order dated December 21, 1987, which incorporated a memorandum summarizing the evidence, the Office denied appellant's request for reconsideration on the basis that the medical evidence submitted in support of reconsideration was duplicative and repetitious of evidence already of record and, therefore, insufficient to warrant a merit review of the Office's prior decision of September 29, 1987.

The Board finds that appellant has failed to discharge his burden of proof in establishing that his cervical radiculitis is causally related to factors of his federal employment.

A person who claims benefits under the Federal Employees' Compensation Act [1] has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation is caused or adversely affected by his employment.[2] This burden includes the necessity of furnishing rationalized medical opinion evidence showing a causal relationship between the alleged condition and factors of his employment which is based upon a proper medical and factual background of the claimant and a specific and accurate history of employment incidents or factors alleged to have caused or exacerbated the claimed disability.[3] The medical evidence submitted by appellant did not meet this criteria.

Although, in support of his claim, appellant submitted substantial medical records documenting that he has cervical radiculopathy and was disabled as a result thereof, the majority of these reports did not address the cause or etiology of appellant's condition or relate his condition to factors of his employment. The reports principally disclosed findings upon examination and testing, submitted diagnoses and described treatment rendered. None, however, provided an account of his medical history, including preexisting conditions, prior illnesses or injuries, if any, as a means of determining the cause or etiology of appellant's condition. The only reports addressing the issue of causal relationship between appellant's cervical radiculopathy and his employment were two reports of Dr. Kornel, a neurosurgeon and appellant's principal treating physician. In his April 6, 1987 report, Dr. Kornel stated that it is "very likely" that appellant's job resulted in his cervical disease and in his August 28, 1987 report, Dr. Kornel stated that he reviewed appellant's job description and stated that the type of employment activity engaged in by appellant for many years "has a high probability of causing degenerative cervical disc and joint disease." Dr. Kornel's opinions supporting causal relationship were not supported by medical rationale and there is no indication that they are based upon a complete and accurate medical and factual background of appellant. Consequently, these reports are of diminished probative value to appellant's claim.

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[1] 5 U.S.C. section 8101 *et seq.*

[2] *Birger Areskog,* 30 ECAB 571 (1979).

[3] *William Nimitz, Jr.,* 30 ECAB 567 (1979).

An award of compensation may not be based on surmise, conjecture or speculation.[4] The Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[5] Neither the fact that the disease or condition became apparent during a period of employment nor the belief that the disease was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[6] While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty,[7] neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[8] Appellant submitted no such evidence in support of his claim and, therefore, failed to discharge his burden of proof.

The Board further finds that the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. section 8128(a) did not constitute an abuse of discretion.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law, or
>
> "(ii) Advancing a point of law or fact not previously considered by the Office, or
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office." [9]

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[4] *Id.*

[5] *Birger Areskog,* note 2 *supra.*

[6] *See Lillian M. Jones,* 34 ECAB 379 (1982).

[7] *See Kenneth J. Deerman,* 34 ECAB 641 (1983).

[8] *See Margaret A. Donnelly,* 15 ECAB 40 (1963); *Morris Scanlon,* 11 ECAB 384 (1960).

[9] 20 C.F.R. section 10.138(b)(1) (revised April 1, 1987).

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[10]

In the instant case, appellant, in support of his request for reconsideration, resubmitted Dr. Kornel's August 28, 1987 report. This report was of record and considered by the Office prior to issuance of its September 29, 1987 decision. Thus the evidence submitted by appellant in support of his request for reconsideration was duplicative of evidence already contained in the case record and did not constitute a basis for reopening appellant's case for merit review under 20 C.F.R. section 10.138.[11]

The decisions of the Office of Workers' Compensation Programs dated September 29, 1987 and December 21, 1987 are hereby affirmed.

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[10] 20 C.F.R. section 10.138(b)(2) (April 1, 1987).

[11] *See also Marta Z. DeGuzman (Amadeo DeGuzman)*, 35 ECAB 309 (1983).

In the Matter of VITO S. CAPRIO *and* U.S. POSTAL SERVICE, POST OFFICE, St. Petersburg, Fla.

Docket No. 88-1136; Submitted on the Record;
Issued September 9, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's accepted condition of permanent aggravation of degenerative osteoarthritis of the right knee had ceased by March 8, 1988; and (2) whether appellant has more than a 20 percent permanent impairment of the right leg, for which he received a schedule award, as a result of employment-related occupational disease of the right knee.

On February 12, 1979 appellant, then a 59-year-old letter carrier, filed a notice of occupational disease claiming that he developed a painful right knee injury as a result of delivering mail. Appellant noted that he first became aware of his right knee problem on May 5, 1942 due to a war injury, and noted that he first realized it was aggravated by his employment in January 1967 when the right knee began to give out as he was delivering mail, causing increasingly severe pain. Appellant stopped work permanently on January 2, 1979 and subsequently retired on disability. In an attached statement appellant noted that after his discharge from military service, on August 10, 1949 he was awarded a 10 percent disability for his right knee injury, which he continued to receive; he noted that he began work at the employing establishment in January 1957 and that he "continued to have pain and crunching sensation and buckling of [his] right knee," for which he wore an elastic knee support.

In support of his claim appellant submitted a January 29, 1979 CA-20 attending physician's report from Dr. Artagnan Crespo, an orthopedic surgeon, who diagnosed degenerative arthritis of the right knee with a diminished lateral compartment and a valgus deformity in the knee. Dr. Crespo opined that appellant's condition was related to his history of knee injury in 1942, which "has been aggravated through the years and will continue to degenerate through the years if [appellant] continues with the same type of work where he has to walk as a mail carrier and carry heavy loads."

Appellant's medical records were reviewed by an Office referral physician, Dr. Harry L. Collins, an orthopedic surgeon, who noted the evidence that appellant now had osteoarthritis of the medial compartment of the right knee of sufficient severity to preclude his working as a mail carrier, but who opined that it was probable but not certain "that his knee would be in its present condition whether or not he worked as a postman during those years."

The Office determined that a conflict in medical opinion evidence existed between Drs. Crespo and Collins, and referred appellant with a statement of accepted facts and the complete case record to an impartial specialist for resolution of the conflict.

Appellant was referred to Dr. Martin A. Kornreich, a Board-certified orthopedic surgeon, on December 12, 1980. By report dated February 9, 1981 Dr. Kornreich reviewed appellant's history and the statement of accepted facts, noted that he examined appellant on January 30, 1981, and diagnosed degenerative joint disease of the right knee involving the medial and patellofemoral compartments. Dr. Kornreich noted as follows: "It is reasonable to state that all activities which [appellant] has carried out in his lifetime have aggravated his preexisting military service knee injury. In this regard, his employment as a machinist for 12 years served to aggravate his knee condition, as well as his 22 years as a postal service employee. If [appellant] had chosen a more sedentary form of work rather than that required by his position as a letter carrier, the present degenerative arthritis of his knee would still be present, but probably to a lesser degree. . . . The aggravation of his remote injury due to 22 years of employment as a letter carrier [is] on a permanent basis. However, the initiating and underlying responsibility for his present condition obviously remains the trauma that he incurred in the military service in 1942." Dr. Kornreich also noted that appellant demonstrated a permanent disability of his right lower extremity due to his degenerative joint disease of 20 percent. An enclosed work restriction evaluation noted that appellant had reached maximum improvement and could work six hours a day performing sedentary work only.

On March 23, 1981 the Office of Workers' Compensation Programs accepted appellant's claim for permanent aggravation of degenerative osteoarthritis of the right knee.

In response to a letter of request from the Office, the Veterans Administration noted in an August 28, 1981 letter that appellant was paid for a 10 percent impairment of his right knee up to September 20, 1978, and noted that beginning September 21, 1978 appellant received benefits for a 30 percent impairment of his right knee.

By order dated November 12, 1981 the Office granted appellant a schedule award for a 20 percent permanent impairment of his right leg for the period January 30, 1981 through March 9, 1982 for a total award of 57.6 weeks of compensation.

By letter dated December 28, 1981 the Office provided Dr. Kornreich with a description of the job of cashier/clerical and requested that Dr. Kornreich indicate whether appellant could perform such a job for eight hours a day. By response dated January 12, 1982 Dr. Kornreich replied that appellant was capable of an eight hour work day in the job of cashier/clerical if he could rest his right knee and avoid twisting or squatting. Appellant's wage-earning capacity was subsequently determined and his compensation benefits were adjusted accordingly.

By report dated October 7, 1983 Dr. Kornreich noted that appellant had been reexamined on October 6, 1983 with complaints of more pain in his right knee. Dr. Kornreich noted upon physical examination that although appellant had full extension, he had a 15 degree loss of full flexion of the right knee, and noted that x-rays that date demonstrated narrowing and loss of articular surface of the medial compartment of the knee as well as spurring and arthritis of the patellofemoral compartment. Dr. Kornreich opined that appellant had an increase in the total percentage of impairment of his right lower extremity which he rated at 25 percent rather than the previous 20 percent impairment.

By letter dated October 19, 1983 appellant, through his representative, noted that because his condition had deteriorated somewhat, he had been reexamined by Dr. Kornreich to determine any increased percentage of disability, and he requested that his schedule award be adjusted to an increased amount.

On November 9 and 18, 1983 the Office medical adviser reviewed Dr. Kornreich's October report, noting that a 15 degree loss of flexion was only a 5.5 percent permanent impairment of the lower extremity, which, when added to a two percent laxity, resulted in a seven percent permanent mechanical impairment of the extremity, and noting that the 20 percent schedule award appellant received for his permanent impairment also included compensation for pain; he opined that the progression of appellant's disease was expected and was not work related, resulting in no further increased schedule award due appellant. The Office medical adviser also noted that Dr. Kornreich originally concluded that appellant had a 20 percent permanent impairment of the right lower leg which included an accepted preexisting service-connected disability of 10 percent. The Office medical adviser recommended that additional information be obtained from appellant's attending physician on the nature of appellant's increased impairment. By letter dated January 23, 1984 the Office requested that Dr. Kornreich clarify whether appellant's increased impairment was a "result of the natural process of the underlying disease" or whether it was "related to the accepted condition" of permanent aggravation of his degenerative osteoarthritis condition.

By letter dated January 26, 1984 Dr. Kornreich noted: "I am at a bit of a loss to answer the questions that you pose in your . . . letter. Basically, I would state that the increase in the arthritic complaints and findings are results of the natural process of the underlying disease."

By letter dated April 25, 1984 the Office advised appellant that, based on the medical evidence from Dr. Kornreich, the increase in the percentage of his impairment was a result of the natural process of the underlying disease and was not due to "the January 2, 1979 injury" and that therefore he was not entitled to a schedule award for the increase in his impairment rating.

By letter dated May 22, 1985 appellant appealed the decision of the Office not to award him a five percent increase in his schedule award. In his application for review appellant noted that "Dr. Kornreich guaranteed me a five percent increase in disability," and stated that he believed that Dr. Kornreich changed his decision due to the Office's "badgering correspondence concerning a wartime injury." This appeal was docketed as No. 85-1706. In response the Director of the Office of Workers' Compensation Programs filed a Motion to Dismiss noting that under 20 C.F.R. section 501.3(d)(2) the Board may not consider appeals more than one year from the date of issuance of a final decision of the Director, and noting that the most recent decision in appellant's case was issued on April 25, 1984, more than one year before his appeal.

By order dated November 25, 1985 the Board dismissed appellant's appeal.

By compensation order dated February 19, 1986 the Office rejected appellant's claim finding that he did not have more than a 20 percent loss of use of his right leg as a result of his employment factors.

By letter dated February 28, 1986 appellant, through his representative, requested a hearing on the denial of his claim.

A hearing was held on November 26, 1986 at which appellant testified. By decision dated and finalized January 28, 1987 the hearing representative set aside the February 18, 1986 Office decision and remanded the case for further development and a *de novo* decision. The Office hearing representative found that there was a difference of opinion between Dr. Kornreich and several Office medical advisers on the extent of appellant's permanent impairment. The hearing representative additionally noted that Dr. Kornreich's January 26, 1984 medical opinion, offered after direct inquiry from the Office, and which negated a causal relationship of the worsening of the arthritic condition, was inconsistent with the opinion he previously offered on the same issue and upon which the Office based its acceptance of appellant's condition as "permanent aggravation of degenerative osteoarthritis of the right knee." The hearing representative directed the Office to prepare a comprehensive statement of accepted facts and refer appellant to an impartial medical specialist for a rationalized medical opinion concerning whether the implicated factors of his federal employment "caused the condition presently accepted by the Office," and detailing exactly what diagnosis was applicable for appellant's condition attributable to factors of his federal employment. The hearing representative noted that if the second opinion physician found a permanent employment-related impairment then he should determine the extent of compensable impairment for schedule award purposes.

By letter dated February 26, 1987 the Office referred appellant, together with a statement of accepted facts and the complete case record, to Dr. Vincent M. Tedone, a Board-certified orthopedic surgeon, for evaluation of appellant's condition and its relationship to factors of appellant's employment, and for determination of the extent of any disability remaining as a result.

By report dated April 27, 1987 Dr. Tedone noted that appellant was examined on April 20, 1987 and noted as follows:

> "[Appellant] has a genu varum deformity on both sides with tibia vara on both sides. The right knee flexes to 90 degrees and he lacks 10 degrees of full extension. The left knee flexes to 120 degrees and he lacks five degrees of full extension. There is no varus or valgus instability of the knee and there is no rotational instability noted. [Appellant] has marked crepitus on movement of the patella in the patella femoral notch.
>
> "X-rays of the right knee reveal severe post-traumatic arthritic changes with major involvement of the patella femoral joint and the medial compartment. The articular cartilage space in the medial compartment is just about absent. Impression is post-traumatic arthritis of the right knee. It is felt by this examiner that the initial insult in 1942 was the trauma that was the incipient cause for [appellant's] problem. Since that time walking on the knee and use of the knee has aggravated this condition.
>
> "[Appellant's] condition is permanent at the present time because of joint incongruity, limited movement of the joint and pain on use of the joint. In this examiner's opinion it is felt that [appellant] has a 40% disability of the right lower extremity as a whole. It is also felt that [appellant] will need a right total knee replacement."

On May 19, 1987 the Office medical adviser reviewed Dr. Tedone's report, noted that Dr. Tedone found that walking associated with appellant's employment as a mail carrier aggravated his condition of post-traumatic arthritis and that this aggravation was permanent due to the joint incongruity, limited movement, and pain, and noted that although Dr. Tedone opined that appellant had a 40 percent disability of the right lower extremity, according to the measured degrees of restricted movement, appellant still only had a 20 percent permanent impairment. The Office medical adviser recommended that Dr. Tedone be provided with a copy of the measuring tables for his report completion. By letter dated May 27, 1987 the Office advised Dr. Tedone that based on the AMA

Guides[1] it appeared appellant had a 20 percent impairment of his right leg and requested that he review the attached calculations and advised whether he concurred with the figures.

By letter dated June 19, 1987 Dr. Tedone responded as follows:

> "[Appellant's] total range of motion of his knee is 80 degrees. He has severe destruction of the articular surface which results in marked knee pain. His knee disability severely limits the use of his entire leg, thus the 40 percent impairment."

The Office medical adviser reviewed Dr. Tedone's June 19, 1987 letter and noted that recalculating appellant's impairment giving the maximum amount for pain and loss of strength resulted in a 19 percent impairment of the right lower extremity. By letters dated July 10, August 29, September 21, and October 14, 1987 the Office resubmitted the Office medical adviser's findings to Dr. Tedone for his review with a request that he show how he arrived at a rating of 40 percent impairment. By response dated October 29, 1987 Dr. Tedone noted: "We do not perform this type of test in our office," and referred the Office to his April 27, 1987 report.

By memorandum dated November 5, 1987 an Office claims examiner found that Dr. Tedone's report was wholly inadequate, speculative, and without medical merit or rationale; he noted that Dr. Tedone failed to indicate whether the aggravation of appellant's knee condition was a temporary or a permanent aggravation, and he did not explain how he arrived at the 40 percent impairment rating. The claims examiner concluded that another medical opinion was needed.

By letter dated November 16, 1987 appellant, together with a statement of accepted facts and the complete case record, was referred to Dr. Richard F. Lyster, a Board-certified orthopedic surgeon, for an evaluation of the extent of appellant's disability and an opinion on the relationship of his condition to factors of his federal employment.

Dr. Lyster examined appellant on February 1, 1988, obtained x-rays, and noted as follows:

> "According to [appellant] he was injured 1/2/79. [Appellant] states that he was delivering mail, stumbled on the sidewalk and his right knee gave out. He states that the right knee was 'wrenched.' He went to St. Anthony Hospital, but does not recall the name of the doctor. . . . He then went to the VA

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[1] *See* American Medical Association's *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984).

> and states that he went there because of injury to the right knee that was service-connected. The right knee according to [appellant] has been getting progressively worse and [he] has been going to Dr. Tedone for a work-up for a knee replacement. . . . All complaints at the present time are referable to his right knee. He states that he is not working at the present time and has not worked since he left the postal service in May of 1979 except for a brief stint working as a maintenance man. The history as given by [appellant] does not coincide with the history given to me by your office and apparently he was treated, according to your office, some four months prior to when he gave me a history of being injured.
>
> "On physical examination [appellant] . . . stood and walked with a rolling limping-type gait on the right leg. He had marked varus of both lower extremities and [stood] with an eight cm gap of the knees when both [extremities] were together at the heels. He has the ability to move the back through a full range of motion, does not appear impeded in any way. In the sitting position [appellant] has full extension of both knees. He has no evidence of collateral or cruciate instability of the left knee, although he does have marked crepitus with flexion-extension movements of the left knee. The right knee also has marked crepitus with flexion extension and [appellant] appears to have medial joint laxity of the right knee. In the supine position he has negative straight leg raising at 90 degrees. He has flexion of the left knee to 130 degrees. The right knee when flexed goes to 95 degrees and it stops for what appears to be a bony block. [Appellant] has discomfort with attempted flexion beyond 95 degrees. McMurray's test is negative for pain on the left knee, the right knee is painful to internal rotation of the tibia on the femur. He has bilateral internal torsion as well as bilateral varus attitude of both lower legs. He has +2 patellar reflexes. The Achilles reflexes are absent bilaterally. Sensation appears to be intact. [He] was sent to St. Anthony Hospital for x-rays. The x-ray report is included for your records. The impression is that [appellant] has degenerative changes to both knees with underlying loose bodies in the right knee, as well as possibly in the left knee.

"In answer to your questions in your letter of 11/16/87:

> "[Appelant's] current condition is that he has bilateral varus deformity of the knees with degenerative changes in both knees.
>
> "I believe that the factors are caused by the bow leg deformity and the internal tibial torsion that has probably been present all his life. He did have a history of an injury to the right knee when he was in the service.
>
> "The accepted statement of fact indicates that [appellant] was injured in the service and also injured his left leg with a diagnosis of rupture left plantar's tendon.
>
> "I do not believe that the right knee deterioration is due to any injury and none is seen in the accepted statement of fact. I believe that anybody with varus deformity of the knees will eventually wear them out and this is commonly seen in orthopedic surgery joint replacement of the knee joints. I have no way of stating whether there is such a thing as aggravation of wear and tear in a joint, since anybody who has osteoarthritis of joints aggravates them each time they stand and walk. It does not seem a likely condition to me to think that a worn out knee was aggravated by the type of work that the person elected to do. There would be no way of stating that the aggravation ceased, because each time he stood up to walk around the house, he would further aggravate it.
>
> "At the present time the only recommendation for further care, would be for him to continue with Dr. Tedone and elect to have joint replacements, if that is the recommendation by his treating orthopedic surgeon.
>
> "At the present time I believe that [appellant] has reached MMI from any popliteal injury that he sustained in 1978, and I believe that the osteoarthritis of the knee is commensurate with his age. I have not put a disability rating on him, since I do not have any evidence in the accepted statement of fact that he injured his knee other than his disability from the United States Army in 1942. I believe that [appellant] would not be able to function in a job where he had any amount of walking to do, other than for the usual necessities of life. He would have to be considered permanently disabled with his present knee problem."

On February 24, 1988 an Office medical adviser reviewed Dr. Lyster's report and opined that Dr. Lyster stated that appellant did not have a permanent aggravation of his condition, and that any need for further medical treatment could not be attributed to employment factors.

By compensation order dated March 9, 1988 the Office rejected appellant's claim finding that appellant's physical condition, which caused his disability and need for medical treatment and his resulting impairment, was not attributable to factors of his federal employment, and finding that appellant did not have in excess of a 20 percent permanent impairment of his right leg as a result of his occupationally-related disease of the right knee. In an incorporated memorandum the Office claims examiner noted that Dr. Lyster's report was well-rationalized and negated that appellant's disability was due to employment factors which rendered moot any increase in appellant's impairment rating. The claims examiner opined that the Office prematurely accepted appellant's claim for permanent aggravation of the underlying condition and opined that the weight of the medical evidence was represented by Dr. Lyster who found that "employment factors did not cause a permanent aggravation of the underlying condition, . . . [such that] the acceptance of the case for permanent aggravation should be rescinded to show temporary aggravation which has ceased."

The Board finds that the Office improperly determined that appellant's accepted condition of permanent aggravation of degenerative osteoarthritis of the right knee had ceased by March 8, 1988, and that the case is not in posture for decision on the issue of whether appellant has more than a 20 percent permanent impairment of the right lower extremity.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disabilty causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment,[2] or that its original determination was erroneous.[3]

In the present case the Office accepted that the aggravation of appellant's preexisting right knee condition due to factors of his federal employment was on a permanent basis. The Office subsequently granted appellant a schedule award for a 20 percent permanent impairment of the right lower extremity. Thereafter appellant experienced what he and Dr. Kornreich considered to be further degeneration of his right knee osteoarthritic condition; however Dr. Kornreich failed to explain how he arrived at the additional five percent impairment for a total right lower extremity permanent impairment of 25 percent.

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[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *John Wilkes, Jr.*, 36 ECAB 451 (1985); *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Leona Z. Blair*, 37 ECAB 615 (1986); *Thomas Meyers*, 35 ECAB 381 (1983).

The Office medical advisers subsequently reviewing the record did not agree with the earlier Office determination and acceptance that appellant's condition was a permanent aggravation of his preexisting osteoarthritic condition, nor did they agree with Dr. Kornreich's calculations by which he arrived at the 20 percent original permanent impairment which had been accepted by the Office, or the 25 percent alleged subsequent impairment, but the Office failed to determine that a conflict existed in the medical evidence at that point, and failed to refer appellant to a referee medical specialist for an impartial determination, based upon the factors delineated in the AMA *Guides*, of the nature and extent of appellant's permanent impairment.

The Office attempted to articulate the issue and sought clarification of Dr. Kornreich's opinion on whether he thought that appellant's increased impairment was a result of the "natural process of the underlying disease" or whether it was related to the "accepted condition" of permanent aggravation of his degenerative ostoearthritis condition. The Office, however, failed to request that Dr. Kornreich explain how degeneration as the anticipated result of the "natural process" of the disease could be distinguished from degeneration as a result of the accepted condition of permanent aggravation of the disease. The Office additionally failed to obtain such explanation or clarification from any of its medical advisers as a point of reference and a basis for comparison with Dr. Kornreich's responses.

Dr. Kornreich responded that he was at a bit of a loss to answer the questions posed. He stated that appellant's increased arthritic complaints were the results of the natural process of the underlying disease, which an Office hearing representative subsequently found was inconsistent with the opinion Dr. Kornreich had previously offered on the same issue in which he found that appellant's condition was a permanent aggravation of degenerative osteoarthritis. The Board finds that such inconsistent responses from Dr. Kornreich are insufficient to meet the Office's burden to modify or rescind acceptance of appellant's claim.

Appellant was thereafter examined by Dr. Tedone, who opined that the condition was permanent, but who failed to provide any opinion on the nature of the progression of aggravation of appellant's condition as being either temporary or permanent, and he failed to explain how he arrived at a permanent impairment rating of 40 percent. The Board notes that such an opinion is incomplete and does not constitute probative medical opinion evidence.

The Office then referred appellant to Dr. Lyster, who performed a thorough physical examination and evaluation of the extent of appellant's condition. Dr. Lyster, however, stated that "I have no way of stating whether there is such a thing as aggravation of wear and tear in a joint, since anybody who has osteoarthritis of joints aggravates them each time they stand and walk. . . . There would be no way of stating that the aggravation ceased, because each time he stood up to walk around the house he would further aggravate it." The Board notes that this opinion does not state that appellant did not have a permanent aggravation of his condition nor does it state that any need for further treatment is not attributable to the already accepted condition of permanent aggravation of the degenerative osteoarthritic condition. Dr. Lyster also stated that "[i]t does not seem a likely condition to me to think that a worn-out knee was aggravated by the type of work that the person elected to do." The Board notes that this statement is speculative and unrationalized, and is based on an erroneous presumption that appellant had a "worn-out knee" prior to selecting the type of work he would do, which is not supported by the facts of record. The Board notes that although appellant had a preexisting right knee impairment prior to beginning work at the employing establishment, the record contains no evidence that his knee was "worn out" before his 22 years of federal service. The Board also notes that Dr. Lyster failed to place any disability rating on appellant's impairment, and finds, therefore, that Dr. Lyster's opinion is not probative of and cannot be used to determine the extent of appellant's permanent impairment.

Because Dr. Lyster's medical report does not state that appellant's conditon of permanent aggravation of his degenerative osteoarthritis had ceased, it does not constitute the weight of the medical evidence and is not sufficient to meet the Office's burden to show either that the original acceptance was erroneous or that appellant's accepted condition of permanent aggravation had ceased. Additionally, because Dr. Lyster's report does not address the percent of permanent impairment appellant sustained, it is not probative on the issue of whether appellant has greater than a 20 percent permanent impairment for which he received a schedule award.

Because the Office has provided no probative or rationalized evidence showing that its original determination was erroneous or supporting that appellant's allegedly increasing disability was not related to the accepted condition of permanent aggravation of his degenerative osteoarthritis, the Board finds that the Office has failed to meet its burden of proof to justify modification or rescission of its prior award of compensation for permanent aggravation of appellant's degenerative osteoarthritis.

The decision of the Office of Workers' Compensation Programs dated March 9, 1988 determining that appellant's accepted condition of permanent aggravation of degenerative osteoarthritis of the right knee had ceased by March 8, 1988 is hereby reversed, and the case is remanded to the Office for final decision on whether appellant had more than a 20 percent permanent impairment of the right lower extremity.

In the Matter of WILLIE JAMES CLARK *and* VETERANS ADMINISTRATION, LAKESIDE MEDICAL CENTER, Chicago, Ill.

Docket No. 88-1174; Submitted on the Record;
Issued September 12, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has a respiratory or other condition causally related to chemical or pathogenic agent exposure sustained in the course of his federal employment.

On March 6, 1981 appellant, then a 41-year-old former medical technician, filed a notice of occupational disease. Appellant was unable to state the nature of his illness but alleged that he first became aware of it about six months prior to his July 24, 1979 separation from employment due to personal illness. Appellant did not state at what time he first realized his condition may have been employment related, but stated that he experienced symptoms of his unspecified condition six months to a year before his separation from employment. On the reverse of the claim form, the employing establishment stated that appellant first obtained medical care for his illness in 1973 and that this unspecified condition was reported to the employing establishment in 1973. An employing establishment supervisor was unable to comment on the precise nature of appellant's condition or its origin.

Accompanying appellant's claim was a May 14, 1979 memorandum from appellant to the employing establishment. The memorandum discussed appellant's request for leave-without-pay, noting appellant's emotional problems, and also a knee and a gastrointestinal condition allegedly incurred in the Army.

By letter dated September 29, 1981, the Office of Workers' Compensation Programs requested that the employing establishment submit additional evidence, including information on any fumes, chemicals, or other irritants that appellant may have been exposed to. The Office requested that the employing establishment submit evidence concerning the extent and duration of any exposure, and whether other employees were affected by any such exposure.

Appellant submitted a February 3, 1982 report from Dr. Edwin R. Levine, a specialist in pulmonary disease. Dr. Levine stated that appellant was hospitalized from January 18 through January 22, 1982 because of weakness, dyspnea, and cough. Dr. Levine reported appellant's discharge diagnosis to be chemical poisoning, interstitial pneumonitis, and bronchitis. Dr. Levine reported appellant's exposure to chemicals, in relevant part, as follows:

> "[Appellant] worked for a long time in microbiology where he used sodium hydroxide and hydrochloric acid. He inhaled these fumes as he made his diluted hydrochloric acid from the concentrated. There were episodes where he had acute inhalation of sodium hydroxide. . . . [Appellant] used a great deal of xylene which was left open around the place and he was exposed to that."

Dr. Levine reported that x-rays showed evidence of pneumonitis and a "lung scan" showed an area of imperfect perfusion and irregular ventilation. Dr. Levine reported that pulmonary function tests showed "very definite" small airway disease with some evidence of restriction and loss of lung elasticity. Dr. Levine noted inefficiency in ventilation and increased tapping of air. Dr Levine commented on appellant's condition in relevant part:

> "This is a difficult thing to treat since the acute aspects of the condition had cleared and the weakness was a little better, but this is largely a damage done to the central nervous system which is probably permanent in nature and therefore extremely difficulty to treat. . . .
>
> "The major problem continues to be the central nervous system damage which causes weakness and changes including

> loss of memory for recent events (this may be irregular) and some difficulty with concentration following instructions. This is permanent damage and will not improve. It is typical of this problem that there will be days when the symptoms will be much worse. . . ."

By compensation order dated May 21, 1982, the Office rejected appellant's claim on the ground that appellant had failed to discharge his burden of proof. An accompanying memorandum stated that appellant had not submitted essential factual and medical evidence.

By letter dated August 13, 1982, appellant, through his attorney, requested reconsideration and submitted a May 21, 1982 report from Dr. Levine in support of the request.

Dr. Levine's report noted a chemical exposure history similar to that contained in his February 3, 1982 report and stated that appellant "noticed some discomfort all the time he was working." Appellant reported that his eyes bothered him, his throat became irritated, and he felt as though he had a "constant" sore throat. Appellant reported that his coughing would intensify when exposure became more acute and that the cough became a "constant thing with the development of wheezing." Appellant reported to Dr. Levine that with the passage of time appellant became aware of a "progressive weakness and dyspnea" that allegedly prevented him from performing all of his duties. In his review of x-rays, Dr. Levine noted a heart of normal size and shape, and a normal diaphragm although the costophrenic angles were blunted. Hilar shadows were hazy in the mediastinum. Views of the lungs showed "many small nodular and linear shadows" throughout the lung with more density in the lower half. Several nodules appeared to be calcified and representative of "old inflammatory processes." Dr. Levine listed an impression of pneumonitis and lung fibrosis. Dr. Levine reported his findings on pulmonary function testing as follows:

> "FVC [forced vital capacity] is moderately diminished being 85 percent of the predicted figure. FEV_1 [forced expiratory volume in the first second] is also low and FEV_1/FVC figure is only 68 percent (predicted 82 percent). FEV_3 is within normal limits. This indicates some diffuse bronchial obstruction. Maximum Expiratory Flow Rate and Peak Flow are also diminished showing a difficulty in moving air rapidly. Maximum Mid-expiratory Flow Rate is diminished, and this added to the slow-

> ing (tailing off) in the flow volume curve and the spiking in the nitrogen washout, indicates small airways disease. This, with the normal FEV_3, demonstrates that most of the obstructive element is in the small or microscopic airways rather than the major bronchi. The total lung capacity and the functional residual capacity are both normal but the residual volume is high (156 percent of predicted). This is due to either trapping of gas in the lung or the loss of elastic recoil in the lung. Distribution or mixing of gas in the lung is not as good as it should be, indicating some inefficiency of ventilation, MVV [maximal voluntary ventilation] is normal. There is a moderate reduction in diffusion of oxygen through the alveolar membrane as measured by the CO [carbon monoxide] diffusion test. This is the picture of combined restrictive and obstructive disease."

Dr. Levine then reported appellant's arterial blood gas test results, noting that appellant's oxygen was "low" at 83 millimeters per hectogram. Dr. Levine stated that this represented a "true hypoxemia." On physical examination, Dr. Levine reported appellant as "appearing in respiratory insufficiency" but noted the physical examination to be within normal limits. In his discussion, Dr. Levine stated in relevant part:

> "[Appellant] was exposed to several chemical agents by inhalation. . . . There was hydrochloric acid which is a very irritating vapor, causing inflammation in the bronchi and because it is a vapor in the alveoli also. This inflammation results in pneumonitis which may resolve and clear entirely. However, in continued insult caused by repeated inhalation of this very irritating material enough is absorbed into the blood stream and reaches the central nervous system where it produces toxic changes that are permanent in nature. In addition there was also xylene. This is also toxic if inhaled over a long period or if the concentration is high enough. It is in the group of chemicals that are called aromatic hydrocarbons. All of these are irritating to the bronchi and to the lungs. When inhaled there is an inflammatory reaction set up in the bronchi and in the walls of the alveoli. When the concentration is high or if the exposure is over a period of time, a definite pneumonitis is produced. But all aromatic hydrocarbons also cause irritation and depression of the central nervous system. The picture in the acute state is very much like alcohol intoxication. When it is

> chronic . . . the effect is to cause both mental and physical reactions with dizziness, loss of memory, inability to concentrate, irritability, weakness, rapid fatigue and loss of fine coordination.
>
> "We find all of this in [appellant]. He has bronchial and lung irritation, weakness, dyspnea, fatigue, loss of memory, difficulty in concentration. All of this is caused by the inhalation of both hydrogen chloride and of xylene. The bronchial irritation, pneumonitis and fibrosis, and all of the changes associated with the central nervous system are directly due to this inhalation. This problem is permanent and will not improve. It is due to the inhalation of the substances mentioned, which occurred during his performance of his occupation. . . . [Appellant] is incapable of performing the duties of any gainful occupation on a regular basis."

The employing establishment submitted various health records noting appellant's treatment from 1972 through 1979 for various ailments including alcoholism, depression, an occipital lipoma, and a knee injury. A sore throat or a cough were noted in health records from 1974, 1978 and 1979. The sore throats were sometimes diagnosed as strep throat. One of the reports noted that appellant was working a part-time job in addition to his position with the employing establishment.

By compensation order dated January 13, 1983, the Office denied modification of its May 21, 1982 decision after reviewing the case on the merits. The decision stated that appellant failed to submit "essential evidence" in support of his request. An accompanying memorandum noted that "essential factual information" had not been submitted.

By letter dated September 27, 1984, appellant requested reconsideration. Appellant stated that due to the "nature" of his injury, he had been unable to submit the requested evidence. In an accompanying statement, appellant reported while at the employing establishment he was responsible for the handling of "highly pathogenic specimens," handling all microbacteria specimens, and decontamination of equipment which included "negative ventilation." Appellant contended that the working area was "very inadequate" with poor ventilation, inadequate storage area for cultures and chemicals, and problems with the decontamination and elimination of waste material. Appellant contended that he had experienced occurrences of pneumonia and upper respiratory tract infections during the course of his employment. Appellant noted that after a laboratory accident in which he was burned, he began to lose his stamina and mental sharpness. Appellant alleged that, as the problems mounted, the working situation became "almost impossible." Appellant listed the names of several coworkers for verification purposes. Appellant also submitted documents noting that he worked for the employing establishment from 1971 to 1979, that he worked as a part-time medical technician for a private hospital from May 25, 1974 to July 6, 1979, and noting his July 24, 1979 resignation from the employing establishment because of personal illness.

Appellant submitted copies of Dr. Levine's reports, previously noted, and an October 23, 1981 report from Dr. Fon-Yei Sun Wu, a general practitioner and obstetrician. Dr. Wu noted treating appellant since 1974 and stated that appellant had experienced a nervous condition that was his "main" problem and also "frequent" upper respiratory tract infections. Dr. Wu opined that the nervous condition was not employment related but did not offer an opinion as to the cause of the upper respiratory tract infections.

By letter dated November 16, 1984, the Office requested that the employing establishment submit certain additional evidence, including information concerning appellant's duties, his chemical exposure and work conditions, and statements from coworkers named in appellant's September 27, 1984 letter. By letter dated November 16, 1984, the Office also requested that appellant submit additional medical and factual evidence.

Subsequently, the employing establishment submitted certain personnel records and additional health records compiled before and after appellant's employment with the employing establishment. A January 26, 1983 health record reported appellant's complaints of upper respiratory problems for two to three months. An August 1, 1983 neuropsychiatric examination report from an employing establishment physician stated that no central nervous system damage was found. An August 1, 1983 general medical examination report listed no abnormalities upon examination of appellant's respiratory system. A July 9, 1984 hospital summary from an employing establishment physician noted appellant's treatment for gastrointestinal problems and listed diagnoses of mild lumbar canal stenosis, gastric ulcer, history of pneumonitis with toxic fume exposure, and depression. The report noted that appellant was "disabled for three years from being a medical technician because of his respiratory distress and increased general weakness." Appellant was noted to have been hospitalized from January 18 to January 22, 1982 for "chemical interstitial pneumonitis and bronchitis secondary to toxic fume inhalation, sodium hydroxide and hydrochloric acid." The report noted that appellant currently smoked about one pack of cigarettes daily and had done so for about 20 years.

By compensation order dated February 20, 1985, the Office denied modification of its May 21, 1982 decision after reviewing the case on the merits. The decision stated that appellant had submitted insufficient evidence. An accompanying memorandum noted that appellant failed to submit most of the evidence requested in the Office's November 16, 1984 letter.

By letter dated March 18, 1987, appellant requested reconsideration. Appellant stated that he was claiming benefits on account of chemical poisoning, interstitial pneumonitis, and bronchitis. Appellant contended that conditions at the employing establishment resulted in a progressive upper respiratory tract infection with facial lesions and central nervous system changes, causing appellant to experience "severe" exhaustion. Appellant stated that adverse chemical exposure started in 1973 when he was transferred to a microbiology laboratory and that over the years the workload increased "mountainously." Appellant stated that as personnel working in the laboratory increased by "300 percent," the size of the laboratory remained the same. Appellant stated that the personnel changes and changes in techniques and procedures eventually caused "gross contamination" problems resulting in appellant's "increasing" episodes of upper respiratory infections, lower gastrointestinal burning, facial hair loss and ulceration, pain, and fatigue. Appellant stated that his duties consisted of the decontamination, innoculation, and culture of "acid fast" specimens for microbacteria, processing and identifying parasites, and assisting with mycology specimens. Appellant stated that a similar situation existed at his private employer during this time. Appellant contended that his "degenerative medical symptoms" led to his concurrent resignation from both jobs in 1979. Appellant contended that he still experienced occasional blurred vision that he attributed to his federal employment.

After the Office's February 20, 1985 compensation order, the employing establishment submitted a copy of appellant's job description. No evidence concerning the types of chemicals and irritants to which appellant may have been exposed was submitted.

In a May 20, 1987 report, an Office medical adviser, after reviewing the case record and a statement of accepted facts, opined that appellant had not sustained any impairment to his respiratory or other system due to his federal employment. The medical adviser opined that there was no evidence that appellant was disabled for any kind of work.

By compensation order dated October 20, 1987, the Office denied modification of its May 21, 1982 decision after reviewing the case on the merits. The decision stated that appellant had submitted insufficient evidence. An accompanying memorandum noted the Office medical adviser's opinion that appellant had not sustained any condition or disability causally related to factors of his federal employment.

The Board finds that the case is not in posture for a decision.

The evidence of record indicates that appellant was exposed to chemicals and pathogenic agents from sometime in 1973 to July 24, 1979. The employing establishment, despite requests, failed to furnish the Office with a list of the chemicals appellant may have been exposed to and the extent, duration, and associated information concerning any such exposure. Dr. Levine's February 3, 1982 and May 21, 1982 reports provide support for causal relationship between appellant's claimed respiratory symptoms and the chemical exposure sustained by appellant. Dr. Levine stated findings based on pulmonary function testing and arterial blood gas testing in addition to findings on physical and radiological examination. Although the raw test data was not submitted, Dr. Levine's second report did note how certain of the chemicals appellant was exposed to cause the symptoms appellant was experiencing. Dr. Levine concluded that appellant was "incapable" of performing any gainful employment. Dr. Levine failed to address how appellant's private employment and his cigarette smoking may have affected appellant's alleged respiratory condition.

The Office medical adviser opined that appellant had no disability or condition causally related to factors of his federal employment. However, the medical adviser merely stated that he found no evidence in the record to support causal relationship and did not support his conclusion with medical rationale. The medical adviser also failed to address any of the points raised in Dr. Levine's reports.

While the reports submitted by appellant are not sufficient to establish that his respiratory and other alleged conditions are causally related to chemical and pathogenic agent exposure in the course of his federal employment, they are sufficiently probative to require further development of the record.[1] Additionally, the Board has stated that while it is the burden of an employee to establish his or her claim, the Office also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[2] On remand, the Office should obtain from the employing establishment the results of any industrial hygiene tests taken during appellant's period of employment, and obtain past and present listings of all chemicals, irritants, and pathogenic agents in appellant's work area. If industrial hygiene air monitoring surveys are available, they should state the airborne concentration levels for these chemicals in spot sample concentrations and in time-weighted averages for set periods of exposure. The Office should also obtain any other available data from the employing establishment concerning the effect of these chemicals and pathogenic agents on humans. The Office should also request again that the employing establishment submit statements from appellant's coworkers concerning the allegations of appellant and that the employing establishment submit evidence concerning the precise dates of exposure and any other evidence concerning any similar or related claims by other employees. Finally, the Office should request that the employing establishment furnish evidence concerning safety equipment and precautions that may have been available for personnel and comments on appellant's claim regarding his claimed occupational exposure.

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[1] *See Horace Langhorne,* 29 ECAB 820 (1978).

After the employing establishment provides the Office with such information as requested in this opinion, the Office should prepare an updated statement of accepted facts stating the precise dates of chemical and pathogenic agent exposure and the chemicals and pathogenic agents to which appellant was exposed and include all available industrial hygiene studies and other relevant evidence (as outlined above). Thereafter, appellant should be referred to an appropriate Board-certified specialist for a rationalized medical opinion on the causal relation between appellant's claimed respiratory or other condition and his exposure to workplace chemicals and pathogenic agents.

After such further development as the Office deems necessary, a *de novo* decision should be issued.

The October 27, 1987 Office of Workers' Compensation Programs decision is set aside and the case is remanded for further development consistent with this decision of the Board.

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[2] *See Russel Martin Dawson*, 32 ECAB 1998 (1981).

In the Matter of MARLENE G. OWENS *and* U.S. POSTAL SERVICE, POST OFFICE, Tampa, Fla.

Docket No. 88-1169; Submitted on the Record;
Issued September 12, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has any continuing disability due to a November 4, 1982 employment injury; and (2) whether appellant has any residual impairment entitling her to medical benefits which include physical therapy.

On November 5, 1982 appellant, then a 36-year-old trainee letter carrier, filed a claim alleging that she sustained low back pain and bleeding on November 4, 1982 when she was lifting a ramp that attaches to a truck. Appellant stopped work on November 6, 1982 and returned to work on November 8, 1982. Appellant received continuation of pay for November 6, 7 and for intermittent periods through January 13, 1983.

In a November 5, 1982 attending physician's report, Dr. Laura Harper, a Board-certified internist, diagnosed a sacral strain. Dr. Harper reported that appellant developed low back pain and a small amount of vaginal bleeding following the employment incident. Dr. Harper noted findings of sacral paravertebral tenderness but no further bleeding. Appellant was advised to rest and to avoid lifting and bending. Dr. Harper anticipated no permanent effects would result from the November 4, 1982 incident and released appellant to light work on November 8, 1982.

Dr. Donald C. Sullivan, a Board-certified orthopedic surgeon and appellant's treating physician, submitted a November 24, 1982 report which noted the November 4, 1982 employment incident and appellant's treatment for a bladder infection. Dr. Sullivan stated that appellant was referred to him following her November 17, 1982 hospitalization for back pain. Dr. Sullivan reported that appellant had no previous history of back pain. X-rays were normal and examination was normal except for "some reports of pain over the upper portion of the sacrum." Dr. Sullivan recommended physical therapy and restricted duty, and opined that appellant could work and that she had not sustained any disability.

Subsequently, the Office of Workers' Compensation Programs accepted appellant's condition for a lumbosacral sprain and right sacroiliac sprain and appellant began receiving medical benefits and compensation for intermittent periods of temporary total disability.

Dr. Sullivan continued to submit treatment notes, covering the period of December 7, 1982 through March 29, 1983, reporting appellant's complaints of pain. In a March 29, 1983 note, Dr. Sullivan commented that there was not "much more we can do for her." Dr. Sullivan stated that appellant had met maximum medical improvement and opined that if appellant was "going to continue to have back pain and going to continue to require light duty, then she may have to be retrained for a different job." Subsquently, appellant changed physicians and began receiving treatment from Dr. J. C. Hatch, an osteopath.

In a May 12, 1983 letter to appellant's representative, the Office advised that it had written Dr. Sullivan to ascertain why he stopped treating appellant and that appellant would be referred to Dr. Paul F. Wallace, a Board-certified orthopedic surgeon, for an opinion on appellant's condition.

In a May 17, 1983 letter, Dr. Sullivan reported the following:

> "There were no objective orthopedic findings throughout the period that I treated [appellant].
>
> "Her symptoms and complaints, to some extent, were consistent with a lumbar strain."

In a June 9, 1983 report, Dr. Wallace noted the November 1982 employment incident and stated that appellant continued to have pain after her return to work. Dr. Wallace reported that appellant was receiving "manipulation" for her back which provided "some" relief for about three days. Although appellant reported feeling better, Dr. Wallace noted that she still was bothered by sitting and standing. On examination, Dr. Wallace reported appellant to be a tall, thin woman with tenderness in her back. Appellant was able to bend forward about 60 degrees and came back with normal return rhythm. Lateral and backward bending were "done well," reflexes were equal and active, and straight leg raising was "not limited." Dr. Wallace diagnosed a low back sprain "superimposed on a poorly musculature individual," and commented that appellant had no "real ability physically to do her job to begin with." Dr. Wallace opined that appellant had residual disability "from the condition" that should be temporary. Dr. Wallace commented that appellant could work four hours daily in a sedentary light position. Dr. Wallace concluded that a therapy change to an exercise program would resolve appellant's "situation very quickly."

In a July 15, 1983 report, an Office medical adviser summarized Dr. Wallace's findings and opined that Dr. Wallace's report was somewhat "vague" because while the physical examination was "essentially normal," Dr. Wallace restricted appellant's activities. The medical adviser disagreed and opined that appellant "should be able to work an eight-hour day."

Throughout this period, Dr. Hatch continued to submit various duty status reports, supplemental attending physician's reports, and treatment notes. The duty status reports usually noted a diagnosis of lumbosacral strain with somatic dysfunction of the right sacroiliac articulation, and also noted appellant's ability to perform light work with full restrictions on moderate and heavy lifting. In an April 15, 1983 treatment note, Dr. Hatch noted an increased myofascial spasm in the left lumbosacral region, reporting the sacral base to be unlevel to the left with a left posterior iliac rotation noted. He listed an impression of "continuing sacral base imbalance and somatic dysfunction secondary to lumbosacral strain and probable leg length shortening." Dr. Hatch prescribed medication, a heel lift, and exercises for strengthening appellant's back and abdomen. An April 29, 1983 treatment note reported appellant's subjective complaints of "feeling worse," but noted that appellant had not begun taking medication, was not wearing her lift, and was not performing her exercises. Subsequent treatment notes reported some improvement in appellant's condition when she complied with Dr. Hatch's treatment recommendations.

In an August 1, 1983 report, Dr. Hatch stated that appellant's low back strain had not "responded as expected" as appellant had continued to experience low backache with some radiation into the right lower extremity. Because of the "lingering symptomatology and findings of continued spasm and discomfort," Dr. Hatch recommended that appellant undergo an electromyogram and nerve conduction studies of the right low back and lower extremities to rule out a herniated disc. Dr. Hatch's August 12, 1983 treatment note reported that appellant's test results were within normal limits. Dr. Hatch opined that appellant's "various symptomatologies" indicated "chronic passive congestion and venous stasis within the pelvic organs." Dr. Hatch advised appellant that her condition would likely be adversely affected by her employment and that she should consider vocational rehabilitation.

In a November 3, 1983 supplemental attending physicians report, Dr. Hatch opined that continued findings of spasm and pain in the right sacroiliac and lumbosacral areas were attributable to the November 4, 1982 employment incident. The report noted that appellant had been released to working six hours daily since September 19, 1983.

In a January 17, 1984 fitness-for-duty report based on an examination of that date, Dr. Richard J. Miller, a Board-certified orthopedic surgeon, reported the medical and factual history surrounding the November 4, 1982 employment incident. Dr. Miller noted that Dr. Hatch was presently treating appellant with medication and weekly "manipulations." Dr. Miller listed appellant's present complaints as pain in the lower lumbar area and, upon working for six hours, interscapular pain. Appellant reported that the pain was aggravated by standing. Dr. Miller reported appellant's back pain to be bilateral and "roughly" the size of appellant's hand on either side. Appellant reported occasional leg pain upon standing. Appellant noted no pain or numbness in the arms and indicated that the paraspinous musculature in the interscapular area was the maximum source of discomfort in the interscapular area. On examination, Dr. Miller noted lumbar lordosis and thoracic kyphosis to be present while scoliosis was absent. Appellant complained of increased pain in the lumbosacral area at the extremes of right rotation but the range of motion was not impaired. Flexion was possible to within four inches of the floor with the fingertips with reversal of the lumbar lordosis. Lateral bending was complete bilaterally as was extension. Appellant walked "well" on her toes and heels and performed a complete deep knee bend with ease. Straight leg raising was performed to 90 degrees bilaterally and appellant was able to assume the sitting position without the use of her hands. Knee jerks were brisk and equal bilaterally while ankle jerks were hypoactive but equal bilaterally. X-rays revealed no abnormalities except for an asymmetry of the lumbosacral facettes. Dr. Miller then reported his conclusions and recommendations:

> "At the present time I can find no evidence of any permanent osseous or articular abnormality. I do not feel that she has suffered any residual disability from this accident of 4 November 1982. There is a mild congenital anomaly of the lumbosacral joint with an asymmetry of the facettes but I do not feel that this has been significantly altered by her industrial accident. There has been no permanent aggravation, although there may have been temporary aggravation which has now subsided. This, of course, has subsided sometime prior to my evaluation.
>
> "I do not feel that there are any employment restrictions that should apply to this lady. She is improving and I feel that

> she has recovered sufficiently to resume any and all activities. She is of fairly light stature of 5 feet 8 inches and 129 pounds and was apparently doing rather heavy work which she may not be constitutionally capable of performing on a permanent basis. I do not feel, however, that this restriction should be related to any industrial injury but rather to inherent constitutional or developmental factors."

In an April 9, 1984 letter, the Office again referred appellant to Dr. Wallace for an opinion on causal relationship and on the extent and degree of any remaining employment-related disability.

In an April 30, 1984 report based upon an April 26, 1984 examination, Dr. Wallace noted appellant's complaints of her "whole back" bothering her during and after work. Appellant reported no leg pain and stated that she felt better when she had been off work for a day. Dr. Wallace reported appellant to be "generally tender" throughout the spine. No muscle spasm was noted and appellant had "good" neck motion. Appellant bent forward "a good 70 degrees" and came back with no break in return rhythm. Lateral and backward bendings were done "well" but with complaints of pain. Appellant stated that she felt she could drive a truck and do delivery work for eight hours daily, but indicated that she could not lift heavy loads. Dr. Wallace opined that it would be "unwise" for appellant to lift and carry "the 30 pounds or so of mail" that would be in a letter carrier's backpack. Dr. Wallace opined that appellant could work eight hours daily driving a truck if she could alternately sit and stand during the shift. Dr. Wallace also opined that appellant could presently work eight hours daily if she would use the stool provided in her sorting job although she would not be able to lift over 50 pounds. Dr. Wallace commented that appellant was not "getting any relief" from the Dr. Hatch's treatment "after over a year" and recommended that appellant undertake a regimen of anti-inflammatory medication and exercises.

In an August 14, 1984 report accompanying a work restriction evaluation form, Dr. Hatch reported that appellant continued to experience left-sided lumbosacral discomfort, with occasional radiation into the buttock and posterior aspects of the left lower extremity. Appellant continued to "display spinal somatic dysfunction at the lumbosacral, thoracolumbar and sacroiliac levels." Dr. Hatch opined that appellant had reached maximum medical improvement, noting that appellant had been working six hours daily for the previous six months. Dr. Hatch commented that appellant would continue to experience intermittent discomfort "referable to her work-related injury." On the work restriction evaluation form, Dr. Hatch remarked that appellant should not carry objects or weight on her back or shoulders.

By letter dated November 28, 1984, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. James L. West, a Board-certified orthopedic surgeon, for a rationalized medical opinion on whether appellant had any residual disability from the November 4, 1982 employment injury.

In a January 11, 1985 report based upon a December 28, 1984 examination, Dr. West reported the factual and medical history of the November 1982 employment incident and events that followed. Appellant reported to Dr. West that she had sustained no permanent improvement from Dr. Hatch's osteopathic manipulations. Appellant stated that she was currently working as a reserve carrier six hours daily, a position which required her to case mail, handle flats, and deliver mail. Appellant reported that work activity increased her pain. She claimed to have pain daily that extended from her neck to the tailbone. On examination, Dr. West noted no significant discomfort upon palpation of the dorsal spine. Lumbar lordosis was present but scoliosis was not identified. Dr. West noted a "good" range of motion in the lumbar spine although appellant complained of pain at the extreme of forward flexion and lateral bending. No persistent muscle spasm was noted while appellant was standing on either lower extremity. Appellant walked on her heels and toes without motor problems and there was a good range of motion of the hips, knees, and ankles. Appellant got on and off of the examining table without difficulty and straight leg raising produced no pain. Dr. West stated that appellant complained of pain upon palpation of the lumbar spine and over the right sacroiliac joint. Because Dr. West noted some discrepancy between strength of the abdominal and back musculature, he recommended a physical therapy evaluation be conducted and delayed his "final disability evaluation" pending receipt of the report. The Office received a copy of the physical therapy evaluation on February 13, 1985.

In a May 20, 1985 supplemental attending physician's report, Dr. Hatch released appellant to work eight hours daily as of May 21, 1985 with restrictions of no moderate or heavy lifting and partial restriction as to light lifting, walking, standing, sitting, kneeling, climbing, and bending. Dr. Hatch stated that appellant was not restricted as to "light delivery work." Dr. Hatch reported that appellant was receiving, as required, manipulative therapy, transcutaneous electrical nerve stimulation (TENS), and massage and hot packs as treatment for her condition.

On May 28, 1985, Dr. Hatch scheduled appellant for a computed tomography scan to rule out the possibility of a herniated disc. In a May 29, 1985 report, Dr. Chester C. Babat, a Board-certified radiologist, stated that x-rays of the lumbar spine revealed scoliosis convex to the left while a computed tomography scan of the lumbosacral spine was negative.

After the Office, on August 7, 1985, requested that appellant's physician submit a medical report with an opinion as to the continued benefits of physical therapy and a listing of objective medical findings due to the employment incident, Dr. Hatch submitted an August 15, 1985 report. Dr. Hatch stated that he did not provide physical therapy but instead provided appellant with "physical modalities" consisting of hot packs, occasional electrical stimulation of high voltage galvanic type, and osteopathic manipulative therapy to maintain "optimum spinal architecture." Dr. Hatch continued, in relevant part:

> "[Appellant] has consistently shown throughout the time of therapy spasm and trigger point activity in conjunction with somatic dysfunction occurring in the right lumbosacral and gluteal musculature; this does tend to radiate along the sciatic distribution of the right lower extremity. In addition, she has adaptive lesions and secondary lesions which tend to involve shoulder and scapulothoracic musculature. The diagnosis is a post-traumatic myofascial pain syndrome.
>
> "It is felt that she is at maximum medical improvement; it is felt that she will not show significant benefit beyond the point of maximum medical improvement no matter what form of therapy is offered and the therapy which she . . . will benefit from is not a physical therapy modality but is a newer form of computer modulated, extremely low frequency and micro-amperage electrical current. It is felt that she will benefit from these therapies over the remainder of her life. . . ."

In an August 22, 1985, report, Dr. Hatch further elaborated on objective findings made during appellant's office visits on May 28, 29, and 30, 1985 and June 20, 1985 when appellant complained of right foot numbness and right calf pain. Dr. Hatch listed objective findings for May 28 and 29, 1985 as an inability to elicit an Achilles reflex on either side, equal patellar reflexes bilaterally, and a questionable positive straight leg raising on the right. Objective findings on appellant's May 30, 1985 office visit were listed as the computed tomography scan findings, noted above, and Dr. Hatch noted a "severe" spasm in the cervical spine during appellant's June 20, 1985 office visit.

In an October 9, 1985 report, an Office medical adviser opined that the "suggested physical medicine modalities" suggested in Dr. Hatch's August 15, 1985 report were "questionably effective" in treating appellant's condition. The medical adviser suggested that the Office wait until receipt of Dr. West's final report before deciding to approve such treatment.

By letter dated October 29, 1985, the Office informed appellant's representative that the Office medical adviser had not approved the therapy recommended in Dr. Hatch's August 15, 1985 report.

In a December 3, 1985 letter, the Office informed appellant that her condition had been accepted for a lumbosacral strain and that bills for treatment of myofascial pain syndrome/somatic dysfunction would not be paid by the Office.

In a December 30, 1985 letter, Dr. Hatch advised the Office that appellant's myofascial pain syndrome and somatic dysfunction were "directly" related to appellant's work-related lumbosacral strain. Dr. Hatch stated that this was a "chronic pain syndrome" that would cause appellant "discomfort" for the rest of her life.

In a February 6, 1986 report, Dr. West stated, after reviewing the physical therapy evaluation, the following: "I have reviewed the dynamometer, lifting, [and] muscle strength evaluation tests that were performed by the . . . Rehabilitation Center. In view of my findings, as well as this report, I recommend that this patient return to work activity. An accompanying work restriction evaluation form restricted appellant to lifting no more than 50 pounds and stated that appellant had reached maximum improvement.

In a March 26, 1986 report, Dr. West opined, by stating "yes," that appellant presently had residual disability from her accepted condition. Dr. West diagnosed lumbosacral sprain "with some minimal restricted motions with continued findings referable to the right sacroiliac joint." Dr. West reiterated that appellant could return to her regular work activity subject to the restrictions stated on his earlier work restriction evaluation form, noted above.

An Office claims examiner, in an April 25, 1986 memorandum, concluded that Dr. West's report provided an opinion as to causal relationship and that appellant was entitled to continuing care.

In a May 20, 1986 report, an Office medical adviser stated that physiotherapy for a chronic back condition was of "no lasting value." The medical adviser opined that appellant could obtain the same relief from a warm shower, heating pads, and gentle massage by a family member. A second Office medical adviser concurred with this opinion.

By letter dated June 10, 1986, the Office informed appellant's representative that Dr. Hatch could continue treating appellant for her accepted conditions, lumbosacral sprain and chronic right sacroiliac joint sprain, but that the Office's medical adviser had not authorized further physical therapy.

Following Dr. Hatch's decision to no longer treat appellant, appellant selected Dr. Marc Richman, an osteopath, as her treating physician. Dr. Richman, in a July 7, 1986 report, noted findings similar to those of Dr. Hatch and listed his impression as "chronic lumbosacral strain syndrome." Subsequently, Dr. Richman prescribed physical therapy and a TENS unit. Dr. Richman also advised the Office that appellant could return to regular work subject to restrictions on heavy lifting, and partial restrictions on moderate lifting and certain other activities.

In a November 17, 1986 letter, the Office advised appellant that it would no longer approve payment for physical therapy recommended by Dr. Richman without a detailed and rationalized medical report from Dr. Richman justifying such therapy.

By letter compensation order dated March 4, 1987, the Office rejected appellant's need for continued physiotherapy. A March 2, 1987 Office memorandum noted that the weight of the medical evidence did support appellant's use of a TENS unit.

By letter dated March 6, 1987, appellant, through her representative, requested a hearing.

By compensation order dated June 1, 1987, the Director, on his own motion, vacated the Office's March 4, 1987 decision. In an accompanying memorandum, the Office's hearing representative concluded that the March 4, 1987 Office decision was premature. The hearing representative found that there was an unresolved conflict in the medical evidence between Dr. Miller and Dr. Hatch as to whether appellant had any remaining disability or condition causally related to the November 4, 1982 employment injury and also that there was a conflict in the medical evidence between Dr. Richman and the Office medical adviser as to whether appellant would receive any benefit from continuing physical therapy. The hearing representative noted that Dr. West provided "absolutely no medical rationale" to support his opinions despite requests for clarification. The hearing representative directed that appellant be referred, together with her entire case file and an updated statement of accepted facts that included a description of the physical requirements of appellant's date-of-injury job, to a Board-certified orthopedic surgeon for a reasoned opinion as to whether appellant had any continuing disability or condition causally related to the November 4, 1982 employment injury. If a continuing disability or condition were found, the hearing representative requested that the impartial specialist also express a reasoned opinion as to whether the therapy recommended by Dr. Richman would be indicated.

By letter dated October 1, 1987, the Office referred appellant, together with the case record and an updated statement of accepted facts, to Dr. Ernesto Nieto, a Board-certified orthopedic surgeon. The Office requested that Dr. Nieto submit a narrative medical report containing a complete history of injury, description of objective findings, and test results. The Office requested that Dr. Nieto provide responses to a list of questions, including a present diagnosis, a reasoned medical opinion as to whether the diagnosed condition was causally related to the November 4, 1982 employment injury, and, if there was causal relationship by aggravation, whether the aggravation was temporary or permanent with an explanation of when any temporary aggravation may have ceased. If any work injury impairment remained, the Office requested that Dr. Nieto indicate work restrictions, and if any work-related disability remained, the Office requested that Dr. Nieto provide a reasoned opinion as to whether further physical therapy, recommended by Dr. Richman, would be indicated.

In a November 3, 1987 report based on an examination of that date, Dr. Nieto reported that appellant "sustained a pulling injury to her back" at the employing establishment in 1982. Dr. Nieto noted that appellant was presently "working fulltime, without specific restriction as a letter carrier" and that she was also working approximately four hours of overtime weekly. Dr. Nieto listed appellant's present complaints as continuous back pain of a "moderately severe" nature that was exacerbated by prolonged and strenuous activities. The pain was localized at both sacroiliac joints with the right being worse, as well as complaints of pain at the base of the neck and the interscapular area. Appellant denied radiation of pain into the lower extremities. Upon musculoskeletal examination, Dr. Nieto reported that appellant stood erect without any list, she was able to ambulate on her toes and heels although she complained of low back pain when ambulating on her heels. Straight leg raising was negative bilaterally while in the range of motion in the back there was flexion to 90 degrees, extension to 40 degrees, and lateral bending and rotation to both sides of 25 degrees. Dr. Nieto stated his conclusions in relevant part:

> "At this time . . . there is no indication for specific treatment other than symptomatic. [Appellant] may experience intermittent episodes of pain that will have to be controlled with the necessary medications. She may occasionally need physical therapy, for short periods of time when the symptoms are significant or severe. She also may be benefitted by the use of a TENS unit.
>
> "At this time after examining [appellant] and reviewing the records, there is no indication in my opinion of further testing such as x-rays, myelogram or CT scan.
>
> "She should be able to continue her work as previously without specific restrictions.
>
> "*IMPRESSION:* Post-traumatic chronic lumbar pain syndrome."

An accompanying work restrictions evaluation form indicated that appellant could work more than eight hours daily subject to the restriction of lifting no more than 20 to 50 pounds.

By letter dated February 3, 1988, the Office requested a supplemental opinion from Dr. Nieto. The Office questioned why Dr. Nieto diagnosed post-traumatic chronic lumbar pain syndrome when the "objective" clinical findings were "normal." The Office requested that Dr. Nieto clarify the basis on which he grounded his diagnosis, requesting that he state objective findings, and provide an opinion based on medical reasoning as to whether the diagnosed condition was causally related to the November 4, 1982 work injury.

By letter dated February 9, 1988, Dr. Nieto stated that "at times, back pain is used as a symptom as well as a diagnosis." Dr. Nieto continued in relevant part:

> ". . . I stated as an 'Impression: Post-traumatic chronic lumbar pain syndrome.' This was stated based on [appellant's] history rather than on the physical findings. It is very frequent in a medical practice to find patients with complaints of back pain without findings on examination.
>
> "The awarding of benefits to a person because of subjective complaints is a legal rather than a medical issue."

By compensation order dated April 20, 1988, the Office rejected appellant's claim on the ground that the weight of the medical evidence established that appellant had no objective continuing disability as a result of the November 4, 1982 employment injury. An accompanying memorandum stated that the "weight of the evidence" rested with Dr. Nieto.

The Board finds that appellant has no continuing disability due to a November 4, 1982 employment injury.

Dr. Nieto, the impartial medical specialist, noted in his November 3, 1987 report that appellant was working full-time without specific work restrictions. Following a thorough review of the record and an examination of appellant, Dr. Nieto could find no basis on which to base any continuing disability. In situations where there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.[1] Here, Dr. Nieto's opinion is sufficiently rationalized and based upon a proper factual background.

It should also be noted that, in general, the term "disability" under the Federal Employees' Compensation Act means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury."[2] Applying this definition to the present case, appellant's disability as that term has been defined under the Act ceased when she was released to work eight hours daily by her physician as of May 21, 1985 at a wage equal to or greater than she received before her employment injury.

However, the Board further finds that appellant has residual impairment that entitles her to continuing medical benefits including physical therapy.

The right to medical benefits for an accepted condition is not limited to the period of entitlement to disability compensation.[3] The Office's April 20, 1988 claim rejection failed to consider any continued entitlement to physical therapy that appellant might have despite the hearing representative's June 1, 1987 decision noting a conflict in the medical evidence as to whether the physical therapy recommended by appellant's physicians should be authorized. The Office's April 20, 1988 claim rejection ignored Dr. Nieto's November 3, 1987 report indicating that appellant would likely continue to experience intermittent episodes of pain which would occasionally require physical therapy. Because, as noted above, Dr. Nieto is an impartial medical specialist appointed to resolve a conflict in the medical evidence and his opinion was sufficiently rationalized and based on a proper factual background, his opinion is entitled to special weight. Thus, while Dr. Nieto's opinion established that appellant's disability as defined within the meaning of the Act has ceased, his opinion also established that appellant had residual impairment for which she is entitled to continued medical benefits including physical therapy.

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[1] *William J. Knight, Jr.*, 35 ECAB 650 (1984).

[2] *Billy G. Sinor*, 35 ECAB 419 (1983). *See also* 5 U.S.C. section 8103(a).

[3] *John L. Cardeiro*, 13 ECAB 37 (1961).

The April 20, 1988 Office of Workers' Compensation Programs decision is modified to reflect that appellant has residual impairment entitling her to medical benefits including physical therapy; the decision is affirmed as modified.

In the Matter of HOMER A. PAULSON *and* DEPARTMENT OF THE NAVY, PACIFIC MISSILE TEST CENTER, Point Mugu, Calif.

Docket No. 87-1615; Submitted on the Record;
Issued September 12, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive an overpayment of compensation in the amount of $11,673.53.

On February 4, 1976 appellant, then a 42-year-old warehouseman, filed a claim for a strained right shoulder sustained on January 13, 1976 by unloading boxes. Appellant underwent surgery for a torn rotator cuff of the right shoulder on September 22, 1976 and on July 25, 1977. The Office of Workers' Compensation Programs paid for the surgery and for the period of temporary total disability associated with surgery and convalescence from the surgery. Appellant returned to work with no restrictions on January 3, 1978.

On March 14, 1978 appellant filed a claim for another injury to his right shoulder sustained on March 11, 1978. Appellant stopped work following this injury on March 27, 1979, and did not return. The Office began payment of compensation for temporary total disability on April 24, 1979.

On June 3, 1980 the Office issued appellant a schedule award for a 34 percent permanent loss of use of his right arm. The award was paid from March 18, 1980 to March 30, 1982. Appellant's disability retirement was effective on February 12, 1980 but on March 27, 1982 he elected to receive benefits under the Federal Employees' Compensation Act.

When payments under his schedule award ended, the Office resumed payment of compensation for temporary total disability.

On May 14, 1986 the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount of $11,673.53 which occurred because the Office paid him from April 29, 1979 to August 3, 1985 at a rate of pay based on a 40-hour work week and appellant's actual work week was only 35 hours. The Office determined that appellant was without fault in the matter of the overpayment.

Appellant completed an Office overpayment recovery questionnaire on July 13, 1986 listing his income, expenses, and assets, and stating:

> "I do not believe that I should be made to pay back this overpayment which was due to an administrative error. I budgeted my money for the past 6½ years around the amount I received in compensation and would have spent my money differently if I had received the correct amount. My wife quit her well-paying job in 1981 because we felt I could support us without her working and had diligently saved her income for extra expenses. Due to her health now she can't return to her former employment."

At a hearing held at appellant's request on January 14, 1987 appellant testified that repayment would not now be a financial hardship but might be later, and that his wife had quit her job because they were able to save $300 to $400 a month while receiving the erroneous compensation payments and that she was now unable to work and had given up ten years of government service and her entitlement to retirement benefits. Appellant described his income, assets, and expenses. Appellant's wife testified that when she retired in May 1982, not in 1981 as appellant had previously indicated, she withdrew the $5,000 in her retirement fund at that time and was now unable to work.

By a decision dated March 19, 1987 and made final on March 27, 1987 an Office hearing representative found that appellant was without fault in the overpayment of $11,673.53, but denied waiver of the overpayment. The hearing representative found that recovery of the overpayment would not defeat the purpose of the Act, stating that appellant's testimony at the hearing and his overpayment recovery questionnaire indicated his expenses exceeded his income by about $35.00 per month but that a January 27, 1987 letter in which appellant stated that he could only save $300.00 or less per month at the correct rate of pay indicated that some of the expenses listed by appellant "were somewhat inflated and not an accurate reflection of his monthly obligations." The hearing representative also found that recovery of the overpayment would not be against equity and good conscience, stating there was no evidence appellant relinquished a valuable right or the recovery of the overpayment would change his position for the worse. The hearing representative found that the overpayment should be recovered by having appellant repay $200.00 per month to the Office.

On appeal appellant does not dispute the amount of the overpayment, but contends:

> "With the correct payment of O.W.C. money I would not have asked my wife to resign her position for at least another couple of years as we would have required her money to reach my goal [of having $100,000 at age 59½ to meet unexpected expenses]. With her resignation also was lost her eligibility for retirement and possible disability retirement (i.e. Social Security or Civil Service retirement). Within those two years her health deteriorated rapidly and she could have no longer performed her job as a secretary due to her arthritis."

The Board finds that the Office did not abuse its discretion in determining that recovery of the overpayment would not defeat the purpose of the Act.

To determine whether recovery of the overpayment would defeat the purpose of the Act, paragraph 4(b)(1) of Chapter 2-901 of the Office's procedure manual [1] provides the following guidelines:

> "(1) Recovery of an overpayment will defeat the purpose of the subchapter if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of the subchapter to the extent that:
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> > "(a) The individual from whom recovery is sought needs substantially all of his/her current income (including

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[1] Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments (August 1984)

> FECA monthly benefits) to meet current ordinary and necessary living expenses.
>
> "(b) The individual's assets do not exceed the resource base of $3,000 for a individual or $5,000 for an individual with a spouse or one dependent. . . . This base includes all of the claimant's assets not exempted from recoupment. . . . The first 3,000 or more, depending on the number of claimant's dependents is also exempted from recoupment. The purpose of this exemption is to ensure that recoupment does not leave the claimant without a sufficient buffer against emergencies."

In the recent case of *Robert E. Wenholz*,[2] the Board found that the above-quoted sections 4(b)(1) (a) and (b) were meant to be read conjunctively, and that a claimant must meet both conditions before recovery would defeat the purpose of the Act. Although the evidence is inconclusive regarding whether appellant needs substantially all of his current income to meet his current ordinary and necessary living expenses, appellant's testimony at the hearing and his overpayment recovery questionnaire establish that he has over $30,000 in assets. Thus it is clear that appellant does not meet the criteria of section 4(b)(1)(b) set forth above. Therefore the Office did not abuse its discretion in refusing to waive recovery of the overpayment under the "defeat the purpose of the Act" clause.

The Board finds that the case is not in posture for decision on the issue of whether recovery of the overpayment would be against equity and good conscience.

To determine whether recovery is against equity and good conscience, paragraph 4(c) of Chapter 2-901 of the Office's procedure manual provides, in pertinent part:

> "Against Equity and Good Conscience. If the claimant is not entitled to waiver under the defeat the purpose of the Act clause, the 'against equity and good conscience clause' must be considered. This clause is divided into two parts, financial hardship and detrimental reliance:
>
>> "(1) Financial Hardship. It would be found to be against equity and good conscience when an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria

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[2] 38 ECAB 311 (1986)

> to be applied in making this determination are the same as given in item 4.b. above.
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> "(2) Detrimental Reliance. Recovery of benefit payments is considered to be inequitable and against good conscience when a person, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered."

In the present case an Office hearing representative found that recovery of the overpayment would not be against equity and good conscience, but did not provide detailed findings of fact or a rationalized opinion whether recovery of the overpayment would be against equity and good conscience. Without such findings and rationale the Board is unable to decide whether the Office abused its discretion by refusing to waive the overpayment.[3] The hearing representative made no findings on appellant's contentions that he detrimentally relied on the erroneous amount of compensation by having his wife quit working and thereby relinquish a valuable right or change appellant's position for the worse. Appellant's contentions on this matter should be considered in light of Example 1 of section 4(c) of the Office's procedure manual which addresses a situation where a claimant "resigned his job and withdrew his contribution to the Civil Service Retirement fund, under the assumption that he would receive regular monthly benefits."

The decision of the Office of Workers' Compensation Programs dated March 19, 1987 is affirmed insofar as it determined that recovery of the overpayment of compensation would not defeat the purpose of the Act. Insofar as this decision found that recovery of the overpayment would not be against equity and good conscience, it is set aside and the case remanded to the Office for further consideration and a proper decision.[4]

MICHELE von KELSCH, Alternate Member, *concurring in part and dissenting in part:*

I concur with the majority that the Office of Workers' Compensation Programs did not abuse its discretion in determining that recovery of the overpayment would not defeat the purpose of the Act.

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[3] *Robert Krebs*, 35 ECAB 756 (1984); *Bernard R. Rice*, 33 ECAB 1493 (1982); *Orba Light*, 33 ECAB 1270 (1982).

[4] The Board notes that it has no jurisdiction over the amount appellant is to pay each month for the purpose of recovery of the overpayment, as recovery is not being accomplished by decreasing his later compensation payments. *Robert N. Vachon*, 36 ECAB 502 (1985).

However, I must dissent from the finding of the majority that the case is not in posture for decision on the issue of whether recovery of the overpayment would be against equity and good conscience. The position of the majority expands the parameters of the Federal Employees' Compensation Act to include not only federal employees and those who stand in their stead to receive benefits in their own right: widow[ers], dependent children; but also to include nonfederal employees. In my view this is an unacceptable expansion of the classes of persons covered by the Act. The majority postulates that the hearing representative should have made findings on the contention that the spouse (wife of appellant) detrimentally relied on the erroneous amount of compensation benefits that appellant was receiving and the spouse (not appellant) "quit working," thereby "relinquishing a valuable right" and "changing her position for the worse." Please note appellant, the federal employee, who is receiving benefits did not resign his job, nor did he relinquish a valuable right. Yet, the majority points to the "example" given in the procedure manual which refers to an employee (not his spouse, his daughter/son) who resigns and withdraws his retirement contribution, and thereby lost retention rights. The procedure manual refers to a spouse only when she/he is receiving benefits in her/his own right: as a widow(er) i.e., a surviving beneficiary. The example given with respect to the widow quitting her job is only given consideration when she is entitled in her own right. The statute and the regulations are explicit: the one due consideration of waiver based on equity and good conscience is the individual employee or his entitled beneficiary who has made a decision based on the receipt of compensation, not a nonentitled person.

The Social Security Administration (HHS) Regulations [1] from which the Department of Labor's regulations [2] and procedural manual on the overpayment issue liberally borrowed, only reference the actions of the employee or those in his stead entitled to receive in their own right. This policy intent is further delineated in the 1987 [3] and 1988 [4] Labor regulations which again reference only the actions of the entitled individual.

Although a workers' compensation act should be construed liberally, in order to carry out its manifest purpose, the plain and unequivocal terms of the statute and the regulations promulgated thereunder should not be extended beyond their reasonable import.

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[1] 20 C.F.R. section 404.509.

[2] 20 C.F.R. section 10.314 (1986).

[3] 20 C.F.R. section 10.323 (1987).

[4] 20 C.F.R. section 10.323 (1988).

In accordance with the principle of *expressio unius est exclusio alterius*, those not specified are not included.[5] In my opinion, the wife, a nonfederal employee, not receiving benefits in her own right (as surviving spouse, etc.) is not entitled to consideration of waiver under the Act for any actions she may have taken based on her husband's (the entitled federal employee) compensation. Thus, the reason for the above dissent.

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[5] See Sutherland, *Statutory Construction*, section 47.23.

In the Matter of JACK SUCIC *and* U.S. POSTAL SERVICE, POST OFFICE, St. Louis, Mo.

Docket No. 88-591; Submitted on the Record;
Issued September 12, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether appellant is entitled to continuation of pay for the period June 14, 1986 to June 23, 1986; (2) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability from July 18, 1986 to July 21, 1986 causally related to a May 29, 1986 employment injury thereby entitling him to continuation of pay for this period; and (3) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his request for a hearing.

On May 31, 1986, appellant, then a 31-year-old mailhandler, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on May 29, 1986 he injured his lower back while lifting sacks of mail in the performance of duty. Appellant's claim form indicates that he stopped work on May 31, 1986 and first sought medical treatment on that date at the emergency room at Lutheran Medical Center where he was treated by Dr. James R. Hurd, a Board-certified surgeon specializing in emergency medicine. In a May 31, 1986 duty status report, Dr. Hurd diagnosed "acute low back strain" and stated that appellant was totally disabled for the period May 31, 1986 to June 1, 1986. An x-ray of appellant's lumbar spine taken at Lutheran Medical Center on May 31, 1986 was reported as showing degenerative changes at the L4-L5 and L5-S1 levels.

The record indicates that following his initial examination at Lutheran Medical Center appellant elected to be treated by his physician, Dr. F.R. Congiardo, a chiropractor. In a June 26, 1986 attending physician's report, Dr. Congiardo stated that he examined appellant on June 2, 1986, reported that x-rays revealed subluxation at L5, diagnosed subluxation at L5 with pain radiating into left hip, stated that treatment rendered consisted of manual manipulation at L5 and reported that appellant was totally disabled from June 2, 1986 to June 13, 1986, partially disabled from June 14, 1986 to June 24, 1986 and able to resume regular work on June 25, 1986. The record indicates that appellant returned to work and resumed his regular duties on June 24, 1986.

Based on the medical evidence submitted, the Office of Workers' Compensation Programs accepted appellant's claim for low back strain and subluxation at L5 [1] and authorized payment to appellant of continuation of pay for the period May 31 to June 13, 1986, the period in which he was found to be totally disabled for work.

On July 24, 1986, appellant filed a notice of recurrence of disability and claim for compensation (Form CA-2a) alleging that commencing July 18, 1986 he sustained a recurrence of disability causally related to his May 29, 1986 injury. Appellant's claim form indicates that he stopped work on July 18, 1986 and returned to work on July 22, 1986. Appellant submitted with his claim a July 21, 1986 note from Dr. Congiardo stating that appellant should be placed on light duty for the succeeding four weeks with lifting activity restricted to 25 pounds.

By letter dated August 7, 1986, the Office informed appellant that he needed to submit medical and factual evidence to substantiate that he sustained a recurrence of disability commencing July 18, 1986 causally related to his May 29, 1986 employment injury. In response to this letter, appellant submitted a personal statement dated August 26, 1986 in which he stated that on July 18, 1986, he was lifting letter trays at work when he experienced low back and left hip pain which he believed to be causally related to the May 29, 1986 employment injury. Appellant also submitted the August 29, 1986 report of Dr. Congiardo which stated as follows:

> "[Appellant] contacted our office on June 2, 1986 and stated he was lifting a sack of mail at work and hurt his back.
>
> "Upon examination and diagnostic x-rays, the diagnosis was subluxation of 5th lumbar with pain radiating into left hip.

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[1] The record indicates that initially the Office only accepted that appellant sustained a low back strain as a result of his May 29, 1986 employment injury but subsequently accepted subluxation at L5.

> "The prognosis of [appellant's] condition is favorable and present condition is good, but due to the damage of ligaments and musculature of lower back, the patient was advised on July 21, 1986 to limited lifting for a period of four weeks.
>
> "This patient does not have any history of preexisting conditions to the same part of the body."

By compensation order dated May 11, 1987, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim for compensation finding that the medical evidence of record failed to establish that appellant was disabled for work due to his accepted employment condition during the periods June 14 to June 23, 1986 and July 18 to July 21, 1986. The memorandum noted that the "medical evidence indicates that appellant was capable of limited duty during the periods in question" and therefore he was not entitled to continuation of pay for these periods.

By letter dated May 20, 1987, appellant requested a hearing before an Office hearing representative. By notice of hearing dated June 26, 1987, mailed to appellant's address of record, the Office advised appellant that a hearing had been scheduled for July 24, 1987. The record indicates that appellant failed to appear at the hearing.

By letter decision dated August 10, 1987, the Office found that appellant had abandoned his request for a hearing because he failed to appear at the July 24, 1987 hearing and failed to show good cause for his failure to appear within 10 days from the date of the hearing as required by applicable federal regulations.

By letter dated August 18, 1987, appellant requested reconsideration of the Office's August 10, 1987 decision and requested that another hearing be scheduled and in support of this request, stated that he had moved during May 1987 and the notice of hearing was mailed to his old address which he did not receive.

By letter decision dated November 3, 1987, the Office denied appellant's request for reconsideration and rescheduling of another hearing on the basis that the record showed that the Office, by notice of hearing dated June 26, 1987 mailed to appellant's address of record, properly advised appellant that the hearing had been scheduled for July 24, 1987 and that the record also showed that appellant did not inform the Office of his change of address until August 24, 1987 and that under these circumstances it would not reschedule a hearing. The Office pointed out to appellant that the outstanding issue in his case was his entitlement to continuation of pay for the periods June 14 to June 23, 1986 and July 18 to July 23, 1986 and that this matter could be adequately addressed by a request for reconsideration to the Office accompanied by additional supportive medical evidence.

The Board finds that appellant is entitled to continuation of pay for the period June 14, 1986 to June 23, 1986.

Section 8118 of the Federal Employees' Compensation Act [2] provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury." [3] Section 10.204 of Title 20 of the Code of Federal Regulations, applicable to continuation of pay and as then in effect in 1986, provides that once the Office of Workers' Compensation Programs has authorized payment of continuation of pay to an employee disabled as a result of a traumatic injury [4] such pay shall not be terminated until one of the following occur:

> "(1) The agency receives medical information from the attending physician to the effect that the employee is no longer disabled; or
>
> "(2) The agency receives notification from the Office that pay should be terminated; or
>
> "(3) The expiration of 45 days." [5]

In the instant case, the record indicates that the Office authorized termination of continuation of pay on the basis that appellant was no longer disabled. However neither the Office nor the employing establishment received medical evidence from appellant's attending physician, Dr. Congiardo, a chiropractor, stating that appellant was "no longer disabled" but rather received a June 26, 1986 attending physician's report from Dr. Congiardo stating that appellant was totally disabled for work from June 2, 1986 to June 13, 1986 and partially disabled from June 14, 1986 to June 23, 1986 due to his May 29, 1986 employment injury. The record indicates that on the basis of this report, the Office concluded that appellant was capable of limited duty during his period of partial disability, from June 14, 1986 to June 23, 1986, and was therefore not entitled to continuation of pay for this period.

The Board finds that this reason for denying appellant continuation of pay for the period June 14, 1986 to June 23, 1986 does not

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[2] 5 U.S.C. section 8101 *et seq.*

[3] 5 U.S.C. section 8118.

[4] Generally speaking, the word "disability" in the Act means "incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." *Doris S. Anderson*, 30 ECAB 1252 (1979).

[5] 20 C.F.R. section 10.204 (prior to April 1, 1987 revision).

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comport with the requirements of section 10.204 of Title 20 of the Code of Federal Regulations, as then in effect, nor with the Office's guidelines as set forth in its Procedure Manual.[6] A medical finding of partial disability is not synonymous with a finding of "no longer disabled." The Office's Procedure Manual, in fact, states that "no longer disabled" means "no longer disabled for regular work"; that the "employee is able to return to full regular duty." [7] Accordingly, under this definition, it is clear that a partially disabled employee is not one who is "no longer disabled" within the meaning of section 10.204.

Section 10.204 of Title 20 of the Code of Federal Regulations, as then in effect, makes no provision for termination of continuation of pay on the basis of a finding of partial disability.[8] The Office's Procedure Manual allows for termination of continuation of pay where an employee is found to be partially disabled provided: (1) the "employee returns to full time suitable light duty without official reassignment and with no pay loss; or (2) the "physician's report indicates that the employee is capable of performing light duty" which therefore obligates the employee to accept any reasonable offer of suitable light or limited duty.[9] The evidence of record is insufficient to support a denial of continuation of pay on the basis of either of these two criteria.

The record establishes that appellant, although found to be partially disabled by Dr. Congiardo for the period June 14, 1986 to June 23, 1986, did not return to full-time suitable light-duty work during the period in question. The record also establishes that Dr. Congiardo did not state that appellant was capable of performing light or limited duty. The attending physician's report contains a section on which Dr. Congiardo may have designated the date on which he believed appellant was able to return to work in a light-duty capacity but Dr. Congiardo made no such designation and only listed the date on which appellant could return to work in a full duty capacity.

The issue of whether a disabled employee is capable of performing light or limited-duty employment is not one that can be determined merely on the basis of a physician's statement that the employee is partially disabled where such statement fails to elaborate on the nature and extent of the partial disability and where there is no description as to what activities the light or limited duty involve. The issue is medical in nature and accordingly requires a medical response which defines the extent of the partial disability and delineates the types of activities which the employee can or cannot undertake.[10] The record indicates that the Office did not request additional information from Dr. Congiardo regarding appellant's partial disability and his ability to perform light duty. The medical evidence of record establishes that appellant's employment-related disability ceased by June 24, 1986, the date he returned to work in a full duty capacity and he is therefore entitled to continuation of pay for the period June 14, 1986 to June 23, 1986. In addition, it should be pointed out that the case record is devoid of any evidence that light or limited duty was available or that the employing establishment made a reasonable offer of suitable light or limited-duty work and such offer was refused.

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[6] *See* Federal (FECA) Procedure Manual, Chapter 2-500, Part 2, Claims, paragraph 11 (July 1984).

[7] *Id.*

[8] 20 C.F.R. section 10.204 as revised April 1, 1987, and effective June 1, 1987, now provides that continuation of pay may be terminated if the employing agency receives evidence that the attending physician has found the employee to be partially disabled and the employee refuses suitable work which has been offered by the agency in accordance with section 10.207 or fails to respond to such offer within five work days of receipt of the offer.

[9] *See* note 6 *supra.*

The Board further finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability from July 18, 1986 to July 21, 1986 causally related to his May 29, 1986 employment injury and that he is therefore not entitled to continuation of pay for this period.

Where appellant claims a recurrence of disability due to an accepted employment-related injury he has the burden of establishing by the weight of substantial, reliable and probative evidence that the recurrence of the disabling condition for which he seeks compensation was causally related to the accepted employment injury.[11] As part of this burden, appellant must submit rationalized medical opinion evidence based on a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment injury.[12]

The reports of Dr. Congiardo dated July 21, 1986 and August 29, 1986 failed to provide any statement causally relating appellant's alleged recurrence of disability from July 18, 1986 to July 21, 1986 to his May 29, 1986 employment injury. The July 21, 1986 report simply advised that appellant should be placed on light duty for four weeks and imposed lifting restrictions. The August 29, 1986 report reviewed the history of appellant's employment injury, repeated that appellant should remain on light duty "due to damage of ligaments and musculature of lower back" and concluded with the statement that appellant had no preexisting conditions to "the same part of the body." Such report, while implying a causal relationship between appellant's May 29, 1986 injury and his alleged recurrence of disability commencing July 18, 1986, is neither explicit and definitive on the issue of causal relationship nor supported by medical rationale and is therefore insufficient to substantiate appellant's claim and discharge his burden of proof. Causal relationship cannot be inferred but must be established by reasoned medical opinion evidence.[13]

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[10] *See Gerardo Guajardo*, 34 ECAB 1731 (1983)

[11] *Dennis E. Twardzik*, 34 ECAB 536 (1983)

[12] *Steven J. Wagner*, 32 ECAB 1446 (1981)

Appellant failed to submit such evidence and consequently failed to establish that he sustained employment-related disability for the period July 18, 1986 to July 21, 1986 and is therefore not entitled to continuation of pay or compensation benefits for this period.

The Board further finds that the Office properly found that appellant abandoned his request for a hearing.

Section 10.137(c) of Title 20 of the Code of Federal Regulations pertaining to failure to appear at a scheduled hearing states in relevant part as follows:

> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another be scheduled. Where good cause for failure to appear is shown, another will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[14]

Appellant contends that the notice of hearing was mailed to him at his prior address and because he moved during May 1987 he did not receive the hearing notice. The Board notes that it was appellant's responsibility to inform the Office of his change of address and the record shows that appellant did not notify the Office of his change of address until August 1987, after the scheduled date of the hearing. The record establishes that the Office advised appellant of the July 24, 1987 hearing by notice of hearing dated June 26, 1987 which was sent to appellant's address of record. The record shows that the notice of hearing was not returned to the Office and the presumption is that the notice was forwarded to appellant's new address and was received.[15]

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[13] *See Margaret A. Donnelly*, 15 ECAB 40 (1963).

[14] 20 C.F.R. section 10.137(c) (revised April 1, 1987).

[15] It is presumed that a letter mailed to an individual in the ordinary course of business was received. *Edward Thomas Johnston*, 35 ECAB 910 (1984).

Appellant did not appear at the scheduled hearing and he did not, within 10 days following the hearing, provide the Office with a reason for his failure to appear in accordance with the regulations. The Office, therefore, had sufficient reason to find that the request for hearing had been abandoned.[16]

The decision of the Office of Workers' Compensation Programs dated May 11, 1987 is reversed insofar at it denied appellant continuation of pay for the period June 14, 1986 to June 23, 1986 and is affirmed insofar as it denied appellant continuation of pay for the period July 18, 1986 to July 21, 1986 on the basis that appellant has not established that he sustained employment-related disability during this period. The decisions of the Office dated August 10, 1987 and November 3, 1987 which found that appellant abandoned his request for a hearing are affirmed.

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[16] *Raymond H. Parker*, 33 ECAB 1737 (1982).

In the Matter of JOSEPH J. TILLO *and* DEPARTMENT OF THE ARMY, MONTANA ARMY NATIONAL GUARD, Helena, Mont.

Docket No. 88-1157; Submitted on the Record;
Issued September 13, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has more than an eight percent binaural hearing loss for which he received a schedule award.

On October 22, 1987 appellant, then a 63-year-old retired heavy mobile equipment mechanic general foreman, filed a notice of occupational disease and claim for compensation (Form CA-2), claiming hearing loss caused by noise exposure in the course of his federal employment. Appellant stated that he first became aware of his hearing loss in 1969 but that he did not file his claim sooner because he was not aware that a claim for a hearing loss was valid. Appellant was last exposed to the alleged hazardous noise on February 28, 1981 when he retired. The record indicates that appellant was exposed to noise levels over 91 decibels in his federal employment.

The employing establishment furnished the Office of Workers' Compensation Programs with copies of appellant's job descriptions, personnel records, and medical and audiological evaluations performed by the employing establishment.

In a March 10, 1988 letter the Office referred appellant to Dr. Neil Rogers, a Board-certified otolaryngologist, for otologic examination and audiological evaluation. The Office provided Dr. Rogers with the medical evidence of record and a statement of accepted facts.

Dr. Rogers performed an otologic evaluation of appellant and audiometric testing was conducted on the doctor's behalf on March 18, 1988. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear—15, 15, 25, and 55 decibels; left ear—20, 30, 65, and 65 decibels. Dr. Rogers reviewed these findings and incorporated them into his March 23, 1988 report, together with his findings on otologic examination. Dr. Rogers noted appellant's employment history and "completely normal" ear, nose and throat examination. Upon review of the attached audiogram, Dr. Rogers noted a high tone bilateral sensorineural hearing loss with the left side greater than the right. Dr. Rogers concluded that the bilateral sensorineural hearing loss was due to noise exposure. Dr. Rogers found this hearing loss to be permanent and opined that appellant's treatment should include trying hearing aids.

An Office medical adviser reviewed Dr. Rogers' report and audiometric test results and concluded that appellant had an employment-related noise-induced hearing loss. After applying the Office's current standards for evaluating hearing loss to the results of the March 18, 1988 audiology tests, the Office medical adviser determined that appellant had an eight percent binaural hearing loss.

On April 12, 1988 the Office awarded appellant 16 weeks of compensation based upon an eight percent binaural hearing loss. The period of the award ran from March 18, 1988, the date of the audiogram obtained by Dr. Rogers, to July 7, 1988.

The Board finds that the case is not in posture for decision.

The Federal Employees' Compensation Act schedule award provisions set forth the number of weeks of compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.[1] The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office.[2] However, as a matter of administrative practice, the Board has stated: "For consistent results and to insure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants." [3]

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[1] 5 U.S.C. section 8107.

[2] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977); *Jacob M. Shillings*, Docket No. 87-1877 (issued November 30, 1987).

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984) using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second. The losses at each frequency are added up and averaged and the "fence" of 25 decibels is deducted since, as the *Guides* point out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss. The lesser loss is multiplied by 5, then added to the greater loss and the total is divided by 6 to arrive at the amount of the binaural hearing loss.[4] The Board has concurred in the Office's uses of this new standard for evaluating hearing losses for schedule award purposes.[5]

The Office medical adviser applied the Office's standardized procedures to the March 18, 1988 audiogram obtained by Dr. Rogers. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 15, 15, 25, and 55. These decibel losses were totalled at 110 decibels and were divided by four to obtain the average hearing loss at those cycles of 27.5 decibels. The average of 27.5 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 2.5 decibels which was multiplied by the established factor of 1.5 to compute a 3.75 percent loss of hearing for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 20, 30, 65 and 65. These decibel losses were totalled at 180 decibels and were divided by four to obtain the average hearing loss at those cycles of 45 decibels. The average of 45 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 20 decibels which was multiplied by the established factor of 1.5 to compute a 30 percent loss of hearing for the left ear. To determine the loss for both ears, the 3.75 percent loss of hearing for the right ear, which was the lower loss, was multiplied by five to equal 18.75,

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[3] *Henry L. King*, 25 ECAB 39 at 44 (1973); *August M. Buffa*, 12 ECAB 324 at 325 (1961).

[4] FECA Program Memorandum No. 272 (issued February 24, 1986).

[5] *Danniel C. Goings*, *supra*.

This result was then added to the 30 percent loss of hearing for the left ear, which was the greater loss, to equal 48.75. This result was then divided by six to compute an 8.125 percent binaural hearing loss. This figure was rounded to eight percent.

The schedule award provision of the Act specifies the number of weeks of compensation to be awarded for loss of hearing: for total loss of hearing in one ear, the Act provides for 52 weeks of compensation, for total loss of hearing in both ears, the Act provides for 200 weeks of compensation. Any loss less than total loss is compensated at a proportionate rate, so that an eight percent binaural hearing loss equals 16 weeks of compensation or eight percent of 200 weeks.

The Board notes, however, that FECA Program Memorandum No. 181 (issued November 26, 1984) provides:

> "On occasion, the allowances for loss of hearing in each ear, if computed separately, may be greater than the combined value of bilateral hearing loss."

In such cases, the employee should be given the benefit of the more favorable allowance, as prescribed in the awards for hands and feet in FECA Program Memorandum No. 134. Thus, in such cases, the claimant should be compensated in accordance with the scheduled allowances for the sum of loss of hearing of each ear.[6]

In the present case the Office medical adviser did not apply the program memorandum to the audiometric results reported by Dr. Rogers. Audiometric testing found that appellant has a 30 percent monaural hearing loss in his left ear and a 3.75 percent monaural hearing loss in his right ear.

Calculated separately appellant's schedule award using the monaural hearing loss figures would result in 17.55 weeks of compensation (30 percent multiplied by 52 weeks plus 3.75 percent multiplied by 52 weeks), as opposed to 16 weeks of compensation for an eight percent binaural hearing loss. For this reason the case will be remanded to the Office for issuance of a schedule award in accordance with the Federal Employees' Compensation Act Program Memorandum No. 181.[7]

The April 12, 1988 decision of the Office of Workers' Compensation Programs is set aside and the case record remanded for further action consistent with this opinion.

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[6] *See Sheldon H. Pellow*, 33 ECAB 148 (1981); *Gilbert Mora*, Docket No. 87-209 (issued January 30, 1987).

[7] The Board notes that the Federal (FECA) Procedure Manual section 2-806 (May 1986) incorporates FECA Program Memorandum No. 181.

In the Matter of GAETAN F. VALENZA *and* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Cincinnati, Ohio

Docket No. 88-1216; Submitted on the Record;
Issued September 13, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant's disability due to a respiratory condition causally related to his exposure to tobacco smoke at work ceased by February 24, 1982; and (2) whether appellant's vascular condition is causally related to his exposure to tobacco smoke at work.

This case has previously been on appeal before the Board on two occasions. On the first, the Board, by a decision and order dated April 26, 1984, found that the Office of Workers' Compensation Programs met its burden of establishing that appellant's disability as of February 24, 1982 was no longer causally related to his employment with the well-reasoned and rationalized report of Dr. Dunkin, a Board-certified pulmonary specialist to whom the Office referred appellant. The Board noted that appellant's physician, Dr. Dugan, a Board-certified family practitioner, submitted reports stating that appellant was totally disabled, but did not provide a well-reasoned opinion relating the disability to appellant's employment conditions prior to his retirement in 1972.[1] On the second appeal, the Board, by a decision and order dated September 21, 1987, found that the Office's refusal to reopen appellant's case for further review on the merits of his claim constituted an abuse of discretion. The Board remanded the case to the Office for consideration of the additional medical evidence submitted by appellant, to be followed by a *de novo* decision on the merits of the case.[2]

The additional medical evidence submitted by appellant after the Board issued its April 26, 1984 decision consisted of reports from Dr. John N. Pittman, Dr. Joseph C. Sheehy, Dr. Ronald D. Roberts, Dr. William A. Byron, and Dr. Hubert Chung. Dr. Pittman's reports described appellant's hospitalization from May 21 to 27, 1984 during which a left carotid endartectomy was performed; the discharge diagnosis was left carotid stenosis, arteriosclerosis obliterans with total occlusion of the superficial femoral artery, and a small abdominal aortic aneurysm. In a July 15, 1984 report Dr. Pittman noted that appellant was asymptomatic regarding the left carotid artery, and that he had peripheral vascular disease.

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[1] 35 ECAB 763 (1984).

[2] Docket No. 87-1022.

In a January 29, 1985 report Dr. Sheehy, a Board-certified internist, described appellant's employment and work histories, stated that 13 years of not working might have resulted in the deterioration of appellant's mental skills of which he complained "but it is entirely possible that his cerebrovascular problems do date back to the time prior to his termination of working," and concluded:

> "It is conceivable that his hypertension and his vascular disease were both accelerated by the passive cigarette smoke that he inhaled for the many years of working in his previous environment.
>
> "Medical literature is not conclusive in the effects of passive cigarette smoke but certainly there is every reason to believe that over the next several years, detrimental effects from passive cigarette smoke will continue to pile up in the literature. Based on this probable theory, it would seem to me that Mr. Valenza is indeed: a. Disabled, b. That his disabilities are in part related to his previous work environment."

An Office medical adviser reviewed the medical evidence on May 9, 1985 and stated there was no current evidence supporting appellant's contention that his exposure to cigarette smoke accelerated the progression of his vascular disease, and that Dr. Sheehy's conclusions were conjectural.

In a September 23, 1985 report Dr. Roberts, who is Board-certified in pulmonary disease, described appellant's work and medical histories, stating that asthma was first diagnosed in 1965, and:

> "Once the patient withdrew from the environment of his workplace, his respiratory symptoms gradually and significantly declined in both frequency and severity. He has rarely had to use medications for his asthma over the past few years and continues to do reasonably well with the exception of an occasional nocturnal wheezing and coughing episode. He continues to experience problems when exposed to passive cigarette or cigar smoke."

After setting forth appellant's findings on physical examination and noting that pulmonary function testing done by other physicians "has been consistent with mild, reversible obstructive airways disease," Dr. Roberts concluded:

> "My impression is that Mr. Valenza has suffered from asthma since at least 1963 and that his condition definitely seemed to be worse, although never severe, while exposed to heavy concentrations of cigarette and cigar smoke at his place of work. I am not aware of any body of evidence which incriminates exposure to cigarette and cigar smoke to the *de novo* development of asthma but in all fairness, I am also not aware of any evidence which would disprove this possibility. Once the decision was made to award Mr. Valenza compensation benefits, I am not clear as to how the decision came about to revoke these benefits. The benefits seem to have been awarded without direct proof that the respiratory hazards encountered in the workplace were responsible for causing the asthma but this type of reasoning seems to have been behind the decision to reverse the initial award of benefits. I do not profess to understand the laws pertaining to these decisions but I would have to contend from a medical point of view that the patient was probably just as susceptible to the respiratory hazards present in the workplace to an equal degree from the time that the compensation was awarded up until the present time. Mr. Valenza tells me that a great deal of his work involved visitation of persons under investigation by the IRS at their own offices. He indicates that many of these people felt as if they were under significant stress and consequently 'smoked one cigarette after another.' This would seem to constitute a significant exposure to adverse respiratory conditions even if the home office had been improved with regard to ventilation and smoking habits.
>
> "In reviewing the total material before me, I can easily see that it would be difficult for me to add any significant new data to the excellent reports submitted in the past by Drs. Richard Brashear and Ramon Dunkin. I agree entirely with the fact that the patient has suffered from asthma since about 1963 and found it difficult to work under the conditions associated with his employment by the IRS. I am not qualified to elaborate upon the other aspects of this case; namely, the problems with spastic colitis and atherosclerotic cardiovascular disease."

In an August 4, 1986 report Dr. Sheehy stated:

> "Mr. Valenza's contention is that the environment in which he was forced to work contributed to his difficulties. Specifically, he never had asthma as a child and developed it only later in life he feels because of his constant exposure in the workplace to cigarette smoke and the severe emotional turmoil that he encountered when he sought a clean work environment.
>
> "I think it is fair to say that the cigarette smoke that Mr. Valenza encountered in a passive way did contribute to the development of asthma later in life. Certainly all of the various etiologies of asthma have not been defined but it is well understood that cigarette smoke is intolerable to most asthmatics. Likewise the effect of cigarette smoke on atherosclerosis is well documented in active smokers and there is mounting evidence that passive smoke probably is harmful in terms of circulation to the nonsmoker.
>
> "I basically feel that although Mr. Valenza's problems are not clearcut secondary to difficulties with passive cigarette smoking, that it did indeed contribute to the multiplicity of medical problems which he is now suffering from; namely, bronchial asthma and atherosclerosis with significant impairment of his peripheral circulation.
>
> "Mr. Valenza has researched these problems thoroughly as a lay person and certainly has documentative articles supporting his contention. I would ask a review panel to seriously consider whether a man disabled formerly for many years could in fact go back to work when he has the multitude of problems that Mr. Valenza seems to have and when he would undoubtedly again be exposed to the noxious stimuli of passive cigarette smoking."

In a January 7, 1987 report, Dr. Byron, who is Board-certified in pulmonary disease, stated:

> "I have carefully studied all of his records and prior examinations by other physicians. My understanding of the matter is that Mr. Valenza first began experiencing trouble with asthma in 1965 at which time he worked in a very smoky environment at the I.R.S. He relates to me that he had at least one to two asthmatic attacks a week. His asthmatic attacks were described as episodes of wheezing, cough and shortness of breath. He saw a physician several times during this time but did not have to be hospitalized. He was not put on maintenance medication but was evaluated at the Cleveland Clinic and thought

to have multiple positive skin test responses to many kinds of allergens. Mr. Valenza states that prior to his exposure to the smoky environment, he never had problems with episodic cough, wheezing and dyspnea. Also, once he left that place of employment, he has not since had problems with episodic cough, wheezing and dyspnea. Apparently his claim is such that the smokey environment, particularly the smoke, is what triggered his asthma. Historically, from what he tells me, I cannot dispute what he says. While it is true that his episodes could have been precipitated by common allergens as his first examining physician believes, his history indicates to me otherwise. He only had the attacks when he was exposed to the smoky environments and I think that there is enough substantial evidence that smoke is an irritant that can easily precipitate asthmatic attacks that I cannot dispute what Mr. Valenza says at all. I think that he may well have been troubled by the asthma just due to exposure to smoke during his time of employment there. However, after his employment was terminated, asthma being the reversible disease that it is, he should have had no further problems with his symptoms. From what he tells me now, he has not had any problems with his symptoms since leaving that area. This leaves me to conclude that the asthma probably was triggered by the smoke at that time. Whether that was the sole cause, I cannot say but, from his history, it sounds like it may well have been."

* * *

> "At this point in time, I would not dispute that his asthma could easily have been caused solely by the smoke. However, he should not have any lasting disability from that."

In a February 24, 1987 report Dr. Chung stated that he agreed with Dr. Byron's opinion that appellant's asthma attacks were triggered by his work environment, that in view of appellant's past history of asthma a return to work would have again triggered asthmatic attacks, that asthmatics should avoid the stimuli to which they are sensitive, that appellant certainly had evidence of sensitivity to tobacco smoke in the workplace, and:

> "Dr. Sheehy in his report to the United States Labor Department stated that Mr. Valenza's exposure to tobacco smoke most likely contributed to his atherosclerotic condition. I fully concur with Dr. Sheehy because it has been stated many times

> in prominent medical journals that carbon monoxide emitted from tobacco smoke contributes heavily to the development of circulatory problems. Mr. Valenza's exposure to heavy concentrations of tobacco smoke over many years with the attendant inhalation of carbon monoxide has certainly contributed heavily to the development of his circulatory problems.
>
> "The U.S. Surgeon General stated in December 1986 that secondhand smoke certainly has a detrimental effect on the entire body.
>
> "A return to work as advocated by Dunkin undoubtedly would have resulted in triggering and exacerbating Mr. Valenza's multiple health conditions."

An Office medical adviser reviewed the medical evidence on December 23, 1987 and stated that a medical report from 1972 showed that appellant was shown on testing to be allergic to a number of allergens, that the smoke at work caused a temporary aggravation of his asthma which improved when he was away from the irritating tobacco smoke, that appellant could still be irritated by the other allergens to which he was sensitive, and that there was no evidence that the smoke caused a permanent aggravation or progress or changes in his respiratory system. This Office medical adviser noted that appellant had very labile hypertensive vascular disease, and stated:

> "No definite medical rationale was given that the tobacco smoke caused this man's hypertensive and arteriosclerotic disease but evidence in medical literature is accumulating that tobacco smoke does increase the carbon monoxide and nicotine in the air of the smoke filled or smoke containing room which may aggravate the progress and accelerate the hypertensive and arteriosclerotic factors of vascular disease. Several doctors in their reports allude to this information but there is no proof. However, we have here a very tense man who had difficulties with his fellow workers and clients who refused to quit or reduce polluting the area with smoke, and the smoke could be a factor with its various products of combustion in aggravating and accelerating his condition.
>
> "In conclusion there is no definite proof that the smoke caused a permanent disability in his circulatory system. There is vascular disease in the family and genetic predisposition and hereditary factors are most important."

By a compensation order dated April 5, 1988 the Office found that the additional evidence appellant submitted was insufficient to warrant modification of its prior decision.

The Board finds that the weight of the medical evidence establishes that appellant's disability due to a respiratory condition causally related to his exposure to tobacco smoke at work ceased by February 24, 1982.

On the first appeal, the Board found that the Office met its burden of establishing that appellant's disability as of February 24, 1982 was no longer related to his exposure to tobacco smoke at work with the September 4, 1981 report of Dr. Dunkin, who is Board-certified in pulmonary diseases. In this report, which is quoted extensively in the Board's April 26, 1984 decision and order, Dr. Dunkin stated that asthma was aggravated by exposure to fumes and smoke, but that he saw "no reason to conclude that there had been any permanent aggravation of his condition by the smoky working conditions," and that "the temporary aggravation of his condition terminated shortly after his leaving his employment in December, 1972."

The reports submitted by appellant after the Board's April 26, 1984 decision and order do not refute Dr. Dunkin's position that appellant's exposure to tobacco smoke caused only a temporary aggravation of his asthma. Dr. Roberts stated that appellant's asthma was worse with his exposure to smoke and that it was difficult for him to work under the conditions at the employing establishment, but also stated that there was no evidence "which incriminates exposure to cigarette and cigar smoke to the *de novo* development of asthma." Dr. Byron's report, read as a whole, makes it clear that the doctor considered appellant's asthma attacks, not the asthma itself, to have been triggered or precipitated by his exposure to smoke at work. Dr. Byron further stated that asthma was a reversible disease, that appellant should have had no further problems with his symptoms after leaving work, and that appellant told him that he had not had any problems with his symptoms since leaving work. Dr. Chung agreed with Dr. Byron that appellant's asthma attacks were triggered by his work environment, explaining that appellant was sensitive to tobacco smoke and that asthmatics should avoid stimuli to which they are sensitive.

These reports all indicate that appellant had an underlying condition of asthma, with smoke at work temporarily aggravating this underlying condition in the form of asthma attacks. Appellant is thus entitled to compensation for the periods of disability related to the aggravation, namely the asthma attacks. The Office paid appellant compensation for almost ten years after his retirement and last possible exposure to employment-related tobacco smoke. The weight of the medical evidence establishes that the temporary aggravation of appellant's asthma ended by the time the Office terminated his compensation.

Where the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, the employee's disqualification for continued employment is due to the underlying condition without any contribution by the employment.[3]

The medical evidence indicates that appellant would again have asthma attacks if he returned to an environment involving exposure to tobacco smoke. The proscription against returning to such an environment, however, is based on the effect the exposure might have on the underlying condition. Stated differently, the possibility of a future injury does not constitute an injury under the Federal Employees' Compensation Act and therefore no compensation can be paid for such a possibility.[4]

Appellant has not established that his asthma was caused by his exposure to tobacco smoke at work. Dr. Sheehy stated that the cigarette smoke contributed to the development of appellant's asthma, but provided no rationale explaining this statement.[5] Dr. Byron stated that appellant's asthma "could have easily been caused solely by the smoke," and that from his history it sounded like the smoke "may well have been" the sole cause of his asthma. These statements, like Dr. Sheehy's, are not supported by rationale, and in addition are conjectural and speculative.[6] The weight of the medical evidence establishes that appellant's asthma was an underlying condition temporarily aggravated by his exposure to tobacco smoke at work.

The Board further finds that appellant has not established that his vascular condition is causally related to his exposure to tobacco smoke at work.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment. As part of his burden he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation.[7]

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[3] *James L. Hearn*, 29 ECAB 278 (1978).

[4] *Richard T. DeVito*, 32 ECAB 1868 (1981).

[5] Medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet appellant's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[6] An award of compensation may not be based on surmise, conjecture, or speculation. *William Nimitz, Jr.*, 30 ECAB 567 (1979).

Dr. Sheehy stated that appellant's exposure to cigarette smoke at work contributed to his atherosclerosis, but provided no supporting rationale. Dr. Sheehy also provided no rationale for his conjectural statement "It is conceivable that his hypertension and his vascular disease were both accelerated by the passive cigarette smoke that he inhaled for the many many years of working in his previous environment." Dr. Chung stated that he concurred with Dr. Sheehy's opinion that appellant's exposure to tobacco smoke most likely contributed to his atherosclerotic condition. However, the only rationale Dr. Chung provided was that "prominent medical journals" stated that carbon monoxide from tobacco smoke contributes heavily to the development of circulatory problems. Dr. Chung's opinion is not sufficient to meet appellant's burden of proof because it does not adequately explain the effect the tobacco smoke had on appellant's vascular condition. Such a discussion would necessarily include a rationalized statement on the effect the smoke had on appellant's vascular condition after February 24, 1982, the date the Office terminated his compensation, and a rationalized opinion on the relation between his specific vascular conditions for which he was treated and his exposure to smoke at work.

The decision of the Office of Workers' Compensation Programs dated April 5, 1988 is affirmed.

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[7] *Birger Areskog*, 30 ECAB 571 (1979).

In the Matter of Donney T. Gala *and* Department of Justice, Federal Correctional Institution, Otisville, N.Y.

Docket No. 88-1273; Submitted on the Record;
Issued September 14, 1988

Before Michael J. Walsh, David S. Gerson, Willie T.C. Thomas

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of $397.36 occurred in appellant's case; and (2) whether the Office properly determined that appellant was not without fault in the matter of the overpayment and that, therefore, the overpayment was not subject to waiver.

On December 15, 1983, appellant, a 29-year-old correctional officer, sustained an injury to his right knee while in the performance of duty. Based on the medical evidence submitted, the Office of Workers' Compensation Programs accepted appellant's claim for "medial meniscus tear, right knee," and authorized a right knee partial meniscectomy and arthroscopy which was performed on March 14, 1984 and a repeat arthroscopy and lateral retinacular release which was performed on November 21, 1984. The Office also authorized payment to appellant of continuation of pay for his lost time from work from December 23, 1983 to February 6, 1984 followed by payment of compensation for temporary total disability for his continued disability.

By form letter CA-1049 dated September 25, 1984, the Office notified appellant that he was being placed on the automatic compensation rolls effective September 2, 1984. In this letter, the Office informed appellant that in order to avoid overpayment, he must immediately notify the Office of his return to work and to return to the Office any compensation checks received after his return to work. The record indicates that on or about December 5, 1985, the Office was advised that appellant returned to work on May 25, 1985.[1]

By letter dated February 3, 1986, the Office notified appellant that a preliminary determination had been made that an overpayment in the amount of $1,348.76 had occurred in his case because he returned to work on May 25, 1985 but was erroneously paid compensation for temporary total disability from that date to July 6, 1985. The Office also informed appellant that a preliminary finding had been made that he was at fault in the matter of the overpayment because by form letter CA-1049 dated September 25, 1984 he was aware of his responsibility to immediately advise the Office of his return to work and to return to the Office any compensation checks received after the date of his return to work. The Office advised appellant that this was not a final decision and that if he disagreed with the amount of the overpayment, or that the overpayment occurred or with the finding that he was at fault in the matter of the overpayment, he had the right to submit evidence or arguments in support of his contentions. The Office also advised appellant that he may request a prerecoupment hearing. The Office advised appellant that any response to the preliminary determination of overpayment must be made within 30 days from the date of the letter. The record indicates that appellant did not respond to this letter.

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[1] The record indicates that on May 25, 1985, appellant commenced employment with the U.S. Postal Service. The record also indicates that on November 22, 1985 appellant sustained an injury to his right leg while in the performance of duty. The Office accepted appellant's claim for chondromalacia patella of the right knee and awarded appellant appropriate compensation for his lost time from work due to this injury. By an award of compensation dated May 2, 1988 the Office granted appellant a schedule award for 17 percent permanent impairment of appellant's right lower extremity. By letter decision dated May 20, 1988 the Office denied appellant's request to change physicians. By letter dated May 12, 1988, appellant appealed the May 2, 1988 schedule award by requesting examination of his record by an Office hearing representative. By letter dated June 12, 1988, appellant requested a hearing before an Office hearing representative on the May 20, 1988 decision of the Office denying him a change of physicians. Accordingly, these matters are not subject to review by the Board. *See* 20 C.F.R. section 501.2(c).

By final decision dated March 4, 1986, the Office found that an overpayment in the amount of $1,348.79 had occurred in appellant's case and that he was at fault in the matter of the overpayment because he should have been aware that he was not entitled to the compensation checks covering a period after he returned to work.

By letter dated March 10, 1986, appellant informed the Office that he had not cashed the compensation checks in question and would return them to the Office and that with respect to the issue of fault, advised the Office that he completed a report of termination of disability (Form CA-3) in early May 1985 which he then submitted to the employing establishment who advised appellant that it would be appropriately processed.

The record indicates that appellant subsequently returned to the Office two uncashed compensation checks: one in the amount of $858.22 which stated that it covered the period May 12, 1985 to June 8, 1985; and one in the amount of $858.22 which stated that it covered the period June 9, 1985 to July 6, 1985. The record indicates that these two checks were cancelled and the amounts recredited to the Office's account. The record also indicates that on September 26, 1986, the Office issued appellant a compensation check in the amount of $397.36 for the period May 12, 1985 to May 24, 1985. The record further indicates that on or about October 2, 1986, the Office discovered that appellant actually returned to work on May 12, 1985 [2] and therefore was not entitled to the compensation check covering the period May 12, 1985 to May 24, 1985.

By letter dated November 24, 1986, the Office notified appellant that a preliminary determination had been made that an overpayment in the amount of $397.36 had occurred in his case because he was inadvertently paid disability compensation for the period May 12, 1985 to May 24, 1985, a period during which he worked and received wages. The Office also informed appellant that a preliminary finding had been made that he was at fault in the matter of the overpayment because he was made aware by form letter CA-1049 dated September 24, 1984 that he was not entitled to compensation covering a period after his return to work. The Office advised appellant that this was not a final decision and further advised of the manner in which he may refute the preliminary determination of an overpayment and of his right to request a prerecoupment hearing. The Office requested that appellant submit detailed financial information because in the event it was determined by final decision that the overpayment must be recovered, the financial information would assist the Office in determining the manner of recovery of the overpayment. The Office requested that appellant respond within 30 days from the date of the letter.

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[2] The record indicates that on May 12, 1985, appellant returned to work at the employing establishment and worked there until May 25, 1985 at which time he commenced employment with the U.S. Postal Service

By letter dated December 30, 1986, appellant advised the Office that he was not at fault in the matter of the overpayment and was unaware that he was not entitled to the $397.36 compensation check. Appellant stated that he had previously returned to the Office the two compensation checks covering the period May 12, 1985 to July 6, 1985, that the compensation check now at issue was due to error on the part of the Office, and that at the time the check was issued and received he was receiving other checks from the Office related to another claim and was therefore unaware that he was not entitled to this check and proceeded to cash it. Appellant claimed that recovery of this overpayment would cause him "gross financial hardship." Appellant subsequently submitted, and the Office received on January 14, 1987 the section of the final overpayment decision pertaining to selection of a request for a hearing or, alternatively a request for reevaluation of the finding of fault and relinquishing the right to a hearing and on this form appellant selected reevaluation of the Office's finding of fault and waiver of the overpayment but submitted no supporting documentation in support of this request.

By final decision dated April 29, 1988,[3] the Office found that an overpayment in the amount of $397.36 had occurred in appellant's case and that appellant was at fault in the matter of the overpayment because he accepted a check of which he should have been aware was issued in error and to which he therefore was not entitled.

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[3] The record does not indicate the reason for the delay in issuance of the final overpayment decision

The Board finds that the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of $397.36 occurred in appellant's case.

The record establishes that the Office of Workers' Compensation Programs issued appellant a compensation check in the amount of $397.36 for the period May 12, 1985 to May 24, 1985. The record also establishes, and appellant does not dispute, that appellant returned to work on May 12, 1985. Section 8116 of the Federal Employees' Compensation Act [4] provides, *inter alia*, that an employee may not receive for the same period disability compensation and salary, pay or remuneration of any type (except for remuneration pertaining to military service which is not applicable in appellant's case). Since appellant received both disability compensation and salary for the period May 12, 1985 to May 24, 1985 an overpayment of compensation in the amount of $397.36 occurred in his case.

The Board further finds that appellant was not without fault in the matter of the overpayment and therefore the overpayment is not subject to waiver.

Section 8129(a) of the Act [5] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." [6] No waiver of overpayment, however, is possible if the claimant is not without fault in helping to create the overpayment.

In determining whether an individual is not without fault or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in relevant part:

> "An individual is with fault in the creation of an overpayment who:
>
> '(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
>
> '(2) Failed to furnish information which the individual knew or should have known to be material; or

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[4] 5 U.S.C. section 8101 *et seq.*; *see* 5 U.S.C. section 8116.

[5] 5 U.S.C. section 8129(a).

[6] 5 U.S.C. section 8129(b).

> '(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.' "[7]

In the present case, it is apparent that the Office applied the third standard in finding appellant to be at fault in the matter of the overpayment. The Office found that appellant was aware or should have been that he was not entitled to any compensation checks covering a period in which he was employed because form letter CA-1049 dated September 25, 1984 specifically advised appellant that he was responsible for immediately notifying the Office of his return to employment and for returning to the Office any compensation checks received after his return to employment. The record indicates that appellant was aware of his obligations as set forth in form letter CA-1049. Appellant notified the Office of his return to employment and returned to the Office the two uncashed compensation checks totalling $1,716.44 and covering the period May 12, 1985 to July 6, 1985. After the return of these two checks, the Office, under the mistaken belief that appellant did not return to employment until May 25, 1984, issued appellant a compensation check in the amount of $397.36 for the period May 12, 1985 to May 24, 1985. The issue, therefore, is whether appellant was aware that he was not entitled to the compensation check in the amount of $397.36 issued September 26, 1986.

The record shows that the two compensation checks totalling $1,716.44 which appellant returned to the Office clearly stated on the face of each check the period which the check covered. The Office does not indicate in either its preliminary determination letter or its final overpayment decision whether the compensation check in the amount of $397.36 stated on its face that it covered the period May 12, 1985 to May 24, 1985 thereby alerting appellant that he was receiving compensation for a period during which he was employed and received wages. In his arguments made on appeal, appellant implies that this check did not state that it covered the period May 12, 1985 to May 24, 1985.

On appeal, appellant contends that he was not aware that he was not entitled to the check in question because during the period in which the check was issued and received he was receiving checks from the Office for reimbursement of prescriptions and travel and parking expenses related to doctor's visits and physical therapy for his December 15, 1983 injury. However, the form on which the Office records payment of medical and related expenses pertaining to employment disability, Form CA-800a, indicates that the Office last reimbursed appellant for travel and parking expenses in April 1986 and that appellant was last reimbursed for prescription expenses in September 1985. This form also shows that the Office made direct payment to appellant's physicians and to his physical therapists. Additionally, the record itself does not contain any requests for reimbursement from appellant for travel, parking or prescription expenses during the period in question. Therefore, the record does not support appellant's contention that he believed the $397.36 check constituted a reimbursement check and he has cited no specific examples or submitted documentation of unpaid reimbursable expenses substantiating his statement.

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[7] 20 C.F.R. section 10.320(2) (revised April 1, 1987).

Appellant also contends that he was receiving compensation checks from the Office pertaining to a November 1985 employment injury during the period in which the $397.36 compensation check was issued. The record pertaining to this claim, indicates that compensation checks were not issued beyond August 1, 1986 on which date a final check was issued for the period June 21, 1986 to July 4, 1986. Accordingly, the record does not support appellant's allegation that he would have confused the $397.36 check with a check due him as a result of his November 1985 employment injury.

In determining whether an individual is with fault in the matter of an overpayment, section 10.320 of Title 20 of the Code of Federal Regulations requires the Office to consider "all pertinent circumstances, including age, intelligence, education and physical and mental condition." [8] The record is replete with letters from appellant to the Office which reveal an alert individual who has diligently monitored the processing of his claims by the Office, has carefully reviewed all letters and decisions of the Office, statements and correspondences of the employing establishment and reports of his physicians and therapists and, through his letters to the Office has questioned findings and conclusions, pointed out errors and discrepancies which he believed have occurred in his case, contributed additional information and emphasized and clarified certain points and facts. Given this pattern of attentiveness to the details of his case, appellant's contention that he assumed the compensation for $397.36 was reimbursement of some expenses or related to his November 1985 claim is not persuasive. Appellant's letters do not support that he would have made such an assumption. The evidence currently of record supports a finding that appellant should have been aware that the $397.36 compensation check was incorrect and that he was not entitled to such check.

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[8] *Id.*

Appellant points out on appeal that the overpayment occurred due to fault of the Office which erroneously issued the $397.36 compensation check. The Board has held that although the overpayment may result due to negligence or error on the part of the Office or administering agency, this does not excuse a claimant from accepting a check to which he knew or should have been expected to know he was not entitled.[9]

The Board finds that the Office properly determined that appellant was not without fault in the matter of the overpayment and where an appellant is found to be not without fault, no waiver of the overpayment is possible.

Appellant asserts on appeal that he requested a hearing before the Office on the matter of the overpayment but never received one. This contention is not supported by the evidence of record which shows that by notice received in the Office on January 14, 1987 appellant requested a reevaluation of the finding of fault and elected not to request a hearing.

The April 29, 1988 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[9] *See Robert W. O'Brien*, 36 ECAB 541 (1985); *Pirmin Theunissen*, 33 ECAB 373 (1981).

In the Matter of AMOS MACK *and* DEPARTMENT OF THE NAVY, CHARLESTON NAVAL SHIPYARD, Charleston, S.C.

Docket No. 88-1048; Submitted on the Record;
Issued September 16, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault with regard to an overpayment of compensation in the amount of $984.96 and that therefore the overpayment was not subject to waiver.

On July 10, 1987 appellant, then a 24-year-old welder, sustained a contusion of the lower back in the course of his federal employment. Appellant stopped work that day, and was separated from employment effective July 13, 1987 in accordance with a "Notice of Termination during Probation" given on July 9, 1987.

The Office of Workers' Compensation Programs accepted that appellant sustained an employment injury and approved continuation of pay from July 10 through 13, 1987. The Office also paid temporary total disability compensation from July 14 to August 5, 1987, when appellant's physician released him to return to regular work. The record indicates that a compensation check for that period in the amount of $984.96 was issued on August 28, 1987.

In a letter dated October 12, 1987 appellant stated that subsequent to receiving the compensation check from the Office in the amount of $984.96 he received back pay for the same period on October 2, 1987 in accordance with a settlement agreement with the employing establishment. Appellant stated, "I am writing to find out whom do I make the check out to and how much time do I have to send it in." A memorandum by the employing establishment dated November 16, 1987 confirmed that appellant's separation from employment was "cancelled," and he was given back pay.

By letter dated December 23, 1987 the Office informed appellant that it had made a preliminary determination that there was an overpayment of compensation in the amount of $984.96 for the period July 14 through August 4, 1987 and that he was not without fault in this matter because he knew he was "not entitled to be paid twice for the same period of time." The Office informed appellant of his right to submit evidence or arguments and request, within 30 days, a prerecoupment hearing or reevaluation on the record with regard to the issues whether an overpayment has occurred in the stated amount, whether he was not without fault in the creation of the overpayment, and if without fault, whether the overpayment should be waived.

Appellant did not submit any evidence or arguments and did not request a prerecoupment hearing or reevaluation on the record.

By decision dated February 29, 1988 the Office finalized its preliminary determination, finding that there was an overpayment of compensation in the amount of $984.96 and that appellant was not without fault in this matter so that the overpayment was not subject to waiver.

The Board finds that appellant is without fault with respect to the overpayment of compensation in the amount of $984.96.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation cannot be waived unless the "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." [1]

To determine whether an individual is with or without fault with respect to an overpayment, section 10.320(b) of the federal regulations provides:

> "An individual is with fault in the creation of an overpayment who: (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) Failed to furnish information which the individual knew or should have known to be material; or (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect." [2]

The Office found that appellant was not without fault based on the third standard—acceptance of a payment which he knew or should have known was incorrect. However, the record indicates that at the time appellant received the compensation check in the amount of $984.96, on or about August 28, 1987, he had been separated from employment and was receiving neither continuation of pay nor wages from the employing establishment. Therefore, he had no reason to believe at that time that he was not entitled to receive the compensation check and that the check would subsequently result in an overpayment. Although appellant did later receive back pay from the employing establishment resulting in the overpayment of compensation, there is no factual basis in the record to warrant a conclusion that at the time he accepted the compensation check he knew or should have known that the payment was incorrect. The Board therefore finds that appellant is without fault with respect to the overpayment and that the case must be remanded to the Office for a determination as to whether the overpayment should be waived.[3]

The decision of the Office of Workers' Compensation Programs dated February 29, 1988 is hereby reversed, and the case remanded for a determination as to whether the overpayment should be waived.

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[1] 5 U.S.C. section 8129.

[2] 20 C.F.R. section 10.320(b).

[3] For appellant's information, and as he has been advised by Office in its notice of preliminary determination regarding the overpayment, a finding of "without fault" does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. *See* 5 U.S.C. section 8129; 20 C.F.R. section 10.322-324 (added April 1, 1987); *James M. Albers, Jr.*, 36 ECAB 340 (1984).

In the Matter of ELMER R. POLAND *and* DEPARTMENT OF THE NAVY, NAVAL AVIONICS CENTER, Indianapolis, Ind.

Docket No. 88-988; Submitted on the Record;
Issued September 19, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant had any disability for work after March 12, 1980, causally related to his federal employment.

On March 18, 1980 appellant, then a 56-year-old inspector, filed a claim alleging that since an employment reassignment his blood pressure had risen, causing him to become disabled. Appellant stopped work on March 12, 1980.[1] In an attached statement appellant explained that on March 12, 1980 he felt "humiliated" by a conversation with his new supervisor, and felt as though he "was going to pop." Appellant was immediately examined at the employing establishment's health clinic, given medication and sent home. Appellant also submitted statements from his supervisor and coemployees regarding their conversations with appellant on March 12, 1980.

In support of his claim appellant submitted medical records from 1955 through April 9, 1980. The records do not record any treatment for hypertension until March 12, 1980. The employing establishment's health unit records note that on March 12, 1980 appellant was "very distraught, very upset" and had stated that his supervisor had been disrespectful to him. Appellant's blood pressure was recorded as 220/120. His diagnosis was reported as "acute exacerbation of blood pressure due to occupational situation."

On March 17, 1980 Dr. J. J. Farrell, Board-certified in family practice, noted that appellant had been having increasing psychosomatic complaints, "from friction with supervisor over past several months. He does not want to quit but may, if supervisor is not transferred." On March 28, 1980 Dr. Farrell noted that appellant's blood pressure was 120/70, and appellant could return to work on March 31, 1980. Appellant did attempt to return to work on March 31, 1980. Appellant was examined at the employing establishment's health unit on March 31, 1980, after his attempt to return to work.

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[1] Appellant returned to work on March 31, 1980, however, he stopped work after one hour.

His blood pressure was noted as 150/96 and his diagnosis was listed as recurrent hypertension.

Dr. James B. Mullen, Board-certified in internal medicine with a subspecialty in cardiovascular disease, reported on April 3, 1980 that appellant's blood pressure was 142/96, and that appellant had hypertensive vascular disease which was disabling and would probably be permanent. On April 4, 1980 Dr. Farrell reported appellant's condition as "tension hypertension." Appellant's blood pressure reading was 120/70.

Dr. Witt Endicott, Board-certified in family practice, prepared a medical report on April 9, 1980 in which he stated:

> "This 56-year-old man has worked at Naval Avionics Center for 29 years. On March 12, 1980 he came to sick bay with an extremely high blood pressure and was treated prior to sending him home in fear of him having a heart attack or stroke. It became apparent that his job was precipitating these elevations of blood pressure because, after treatment, under his doctor's care, he returned to work only to have his blood pressure rise and headaches return requiring that he go home again."

* * *

> "With the recurrence of hypertension and its associated symptoms of headache, chest pain and tingling in left arm, I feel [his] health is too much at risk to allow him to work under the conditions that appear to precipitate these symptoms. According to his physician this is likely to be a permanent condition so I would consider that he is disabled for federal employment."

On April 15, 1980 Dr. Mullen reported as follows:

> "I fully agree with Dr. Endicott's notations of March 12, 1980, which show that this patient's high blood pressure is occupational.
>
> "I have carefully reviewed Mr. Poland's medical history from the war days in the navy through the VA records, and the current Naval Avionics records. It is clear that this patient has developed acute hypertension over a relatively short period of time directly related to unusual stress in his occupational situation. The onset of the unusual stress in his occupational situation was followed directly by stress induced abdominal

> cramping and nervous stomach, followed directly by acute hypertension.
>
> "I have no way of knowing what sudden change in his occupational situation actually took place to bring on this much stress, except for what the patient has described. If factual, the kind of job pressure described could very well produce this much damaging stress."

On April 30, 1980 Dr. Farrell reported that appellant had tension hypertension and "gut problems, . . . due entirely and solely to job conditions since January 1980." The doctor also noted that appellant's blood pressure was well-controlled "off the job" and by diuretic medications.

On May 30, 1980, the Office claims examiner advised appellant that the submitted medical reports lacked medical rationale explaining the causal relationship between appellant's medical condition and factors of his employment. The claims examiner also advised appellant that his physician should state whether appellant's condition was temporarily or permanently aggravated by his federal employment.

Appellant retired on July 7, 1980.

The Office medical adviser reviewed the case record on July 24, 1980 and reported that a diagnosis of hypertension could not be established without evidence of sustained elevation of diastolic pressure, greater than 90 degrees, over three visits, in a resting nonemotional state. The medical adviser noted that appellant's blood pressure, "over time" was entirely within normal limits, and concluded that no diagnosis of hypertension was established.

The Office claims examiner requested on August 11, 1980 that Dr. Farrell provide medical rationale for his opinion that appellant's condition was caused by factors of his employment. Dr. Farrell was also asked to state appellant's work restrictions.

On August 19, 1980 Dr. Farrell reported that appellant's blood pressure was well-controlled by a diuretic medication, while appellant was not working. The doctor concluded as follows:

> "Mr. Poland is totally disabled for that job in that place, under that supervisor. He may be employable under other supervision in another job, but this apparently cannot be arranged. His 'feeling of outrage' is so extreme that he will probably have a stroke if he returned to the same conditions of employment. Adrenalin is a powerful cardiovascular stimulant—the

> 'fight or flight' stress mechanism in this man is overwhelming. He is much more inclined to fight than flee."

On October 6, 1980, the Office referred appellant, along with the case record and statement of accepted facts, to Dr. Thomas J. Petrin, Board-certified in internal medicine, for examination and evaluation.

On November 3, 1980, following appellant's examination, Dr. Petrin reported appellant's medical history and physical findings, noting blood pressure readings of 145/82 and 132/82, on that day. Dr. Petrin then opined as follows:

> "The findings and diagnosis pertaining to job relations are as follows: The patient's conditions which I believe are a result of stress and anxiety are certainly precipitated and aggravated by his current job position. The patient has developed functional bowel disease which is a stress related phenomenon as well as hypertension which in many cases can be a stress related phenomenon. These conditions were not previously noted prior to October 1978.
>
> "The patient does indeed have hypertension, both by past history and by blood pressure readings documented in his family physician's office. However, at the present time on current medical management the patient has an excellent control of his blood pressure and has maintained normal blood pressure readings.
>
> "My opinion at this time is that this patient is currently not disabled for work, however, I would like to temper this statement by indicating that while this patient has now excellent control of his blood pressure and while his irritable bowel syndrome is well-controlled on his current medical program, I believe that if this patient were put back in the work setting which he left in March of 1980 these conditions would be greatly aggravated.
>
> "It is my opinion that while the patient's problems are now well-controlled, if he were to be put back in this exact situation that he left, his problems would recur and probably progress and become worse.
>
> "It is my opinion at this time that if this patient could be placed in a position where there was a marked decrease in the amount of emotional stress he had to tolerate, that he could do quite well and would be able to work and be quite productive. I should note that this patient has worked at Naval Avionics for

> many years and for the six years prior to his transfer into this new section where he developed a severe personality conflict the patient had no problems with hypertension or irritable bowel."

On January 29, 1981 the Office medical adviser again reviewed the case record and opined that appellant did not have hypertension.

By letter dated February 24, 1981 the Office informed appellant that his claim had been reviewed and appellant had not established that he had essential hypertension, or that such hypertension could be caused or materially aggravated by factors of his employment. Appellant was advised that if he had further medical evidence he should submit it for consideration, or if he disagreed with the decision and had no further medical evidence, he should request a formal decision.

On April 7, 1981 Dr. Farrell reported that appellant had "tension hypertension" not "essential hypertension." The doctor also noted that tension hypertension arises only in an emotional state, but was very dangerous at that time. In a report dated April 30, 1981 Dr. Mullen agreed with Dr. Farrell's conclusion that appellant's "tension hypertension" was directly related to the stress of his work environment. Dr. Mullen also opined that appellant had developed the beginning of a permanent hypertensive condition, which was presently controlled by medication.

The Office medical adviser reviewed the file again on June 19, 1981 and opined that a definition of "tension hypertension" had still not been established. The medical adviser explained that "tension hypertension" would require two or more readings while appellant was anxious, secondly, "tension hypertension" could not be equated with "hypertension" which referred to persistently elevated blood pressure for at least three readings, during a relaxed tranquil state. The medical adviser also stated that there was no evidence that transient elevations were associated with risk of vascular disease, myocardial infarction, or cerebral hemmorhage. Finally, the medical adviser noted that it was unknown whether appellant always had blood pressure elevations with stress. The medical adviser concluded that appellant was not disabled.

On August 31, 1981 the Office medical adviser opined that there was no disability from transient elevations in blood pressure unless appellant had an intracranial aneurysm, atherosclerotic heart disease, or long-standing essential hypertension, none of which had been documented in appellant's medical records. The medical adviser also explained that even if appellant was disabled during the transient elevation of blood pressure, the disability ceased when the blood pressure returned to normal, which would have occurred within several minutes.

By letter compensation order dated January 5, 1982, the Office denied appellant's claim finding that appellant's disability for work beginning March 12, 1980 was not due to factors of his federal employment. On February 3, 1982, the Office, by letter compensation order amended its prior compensation order of January 5, 1982 and found that factors of appellant's employment caused a temporary recondition of tension hypertension, which ceased after he was removed from his employment duties on March 12, 1980 and that any continuing disability was not due to factors of his federal employment.

On March 8, 1982 appellant, through his attorney, requested a hearing before an Office hearing representative. By letter dated November 8, 1982 the Office denied appellant's request for hearing as untimely filed.

On November 15, 1982, appellant appealed the denial of his application for a hearing to the Board. By decision dated February 4, 1983, the Board remanded the case to the Office, finding that the Office had not exercised its discretion to determine whether a hearing was desirable despite the expiration of the 30-day period.

On February 16, 1983, the Office requested that appellant submit any new medical evidence.

On February 28, 1983 Dr. Farrell reported that appellant had been treated for tension hypertension, which had an acute onset in March of 1980. The doctor also noted that appellant's prescription dosage had been gradually reduced and terminated on February 25, 1983. The doctor also reported as follows:

> "Semantics are again at issue in disability procedures. Elmer was not hypertensive in the twenty-five years prior to job-caused tension hypertension, nor since, although medicated. We will now see, by stopping medicine, whether hypertension persists. If it does not, that means the hypertension was caused by the job solely. If it does persist, that means hypertension is a job-caused permanent disability."

On May 16, 1983 Dr. Farrell reported that appellant had not had elevated blood pressure since he was taken off antihypertensive medication on February 25, 1983.

A hearing was held before an Office hearing representative on September 20, 1983, at which the appellant appeared and testified. By decision dated February 21, 1984, the Office hearing representative found that the medical evidence of record required further development to determine whether appellant had tension-hypertension or essential hypertension. The medical evidence was also to be developed to determine whether appellant's condition was temporarily or permanently aggravated by factors of appellant's federal employment. The hearing representative requested that Dr. Petrin provide a supplemental report to resolve these questions, or that appellant be referred to an impartial medical specialist for examination and evaluation. On April 6, 1984 the Office referred appellant to Dr. Petrin for examination and evaluation.

On April 26, 1984 Dr. Petrin reported as follows:

> "This gentleman absolutely had no problems with hypertension in his past until the job-related problems occurred and then he developed quite significant hypertension. I really cannot see a more clear rationale for hypertension being precipitated by his employment. I should also note, it is a well known medical fact that stress is a precipitative factor of hypertension.
>
> "In regard to your comment on the distinction between tension hypertension versus essential hypertension, to my knowledge, there is no medical term tension hypertension. We classify hypertension as essential hypertension, which means we do not know the cause, or reversible hypertension which is a very tiny percent of the cases where there are aggravating causes which may be removed. Again, to my knowledge, there is no such terminology as tension hypertension. At this point in time, I am unable to comment whether this phenomenon is a temporary or persistent condition as I have been unaware of the patient's medical history for the past four years and I am sure these records would be best assumed from the family physician.
>
> ". . . It was my opinion in November of 1980 and it is now that the patient did have a medical problem that precluded performance of his normal work duties during the period of time for which his compensation is claimed.
>
> "I am a little bewildered by the need for reevaluation in this gentleman. Medical rationale is obtained from the facts in the case and I believe the facts, as they are outlined both in my

> history and physical examination of 11-03-80 and in my letter of the same day, clearly point out that the patient's condition was certainly caused by the situation of his employment."

On July 6, 1984 the Office medical adviser opined that even if it was accepted that "tension hypertension" was a work-related condition, in the absence of complications of hypertension, such as a stroke, with good control by medication, this condition ceased to be disabling as soon as appellant stopped working and was started on antihypertensive medication.

On March 4, 1985 the Office referred appellant, a statement of accepted facts, and the case record to Dr. Alan Gasner, Board-certified in internal medicine, for examination and evaluation. Dr. Gasner reported on March 18, 1985 that he had examined appellant on that day, and that appellant's blood pressure was 128/82 on the left, 130/90 on the right. Dr. Gasner then stated his conclusions as follows:

> "The patient's condition has been referred to from time to time in his past medical records as 'tension-hypertension.' I agree with all of the other physicians who have indicated there is no such medical diagnosis as 'tension-hypertension.' If it is [essential hypertension] it is indeed an unusual form of essential hypertension in that it did not apparently preexist his problems at work, and also has not recurred since he quit work. This is borne out by the fact that he shows no end organ damage at this point. We must accept the fact that he did have definite documented blood pressure readings out of the normal range and in the hypertensive range while under stress. If this condition was not preexisting, and has not continued since his work, then I must establish a causal relationship between the problems and stress that he was experiencing in the work place and the physiological rise in his blood pressure. Despite the fact that this is a causal relationship, I am not sure that this could be termed a disease. Various stress factors do indeed cause a physiological increase in blood pressure. The most common of these would be physical exercise. We all recognize the fact that physical exercise does produce a significant rise in the blood pressure. It is not uncommon to see systolic blood pressure rise with exercise to the 180 to 200 systolic range. These all seem to relate to the 'fight or flight' mechanism.
>
> "If indeed the patient has accelerated blood pressure produced by stress, it is conceivable that it could be treated with

> medication, particularly . . . beta blockers which tend to control blood pressure produced by and aggravated by stressful situations. If this could have been controlled, the patient could have returned to his normal work duties. This was never given a chance so the question is moot. I do believe however that if the question is, could he have continued with the same stressful situation and performed his duties eight hours a day, 40 hours a week with the elevated blood pressure readings that were obtained, then I would say that this would be unacceptable for prolonged periods of time.
>
> "At this point I see no evidence of preexisting disability or persisting disability since the time he quit his job. We are not sure within all reasonable certainty that he could not have performed his job had he taken appropriate medical steps of taking medication during his working hours, and he might even have been able to perform his job with no disability or problems at all.
>
> "Therefore, in my opinion, there was no previous or persisting disability but only a disability inasmuch as the patient elected not to continue working a stressful situation which caused an exaggerated physiological rise in his blood pressure.
>
> "In summary, I believe that common sense dictated that this patient not perform his duties during the time when his blood pressure was recorded to be abnormally high. I believe that the stressful situation of his job did contribute in a causal manner to an elevation of his blood pressure. I believe that there were a number of ways in which this individual could have dealt with this situation. One of these would have been to take medication during the work day. The other would have been for him to be reassigned to other duties where he would not have been under the supervision of the individual who caused the stressful situation. I do believe that he did not at any time show indications of a permanent or complete disability and that many other options existed for this individual."

On May 4, 1985 the Office medical adviser reviewed Dr. Gasner's report and then opined that appellant's diagnosis was "transient episode of elevated blood pressure," rather than "essential hypertension" since appellant had no evidence of active disease. The medical adviser also opined that the transient episode of elevated blood pressure *was* precipitated by factors of employment, however ceased when the precipitating factor was removed and appellant stopped working, without causing permanent disability.

By compensation order dated October 2, 1987, the Office denied appellant's claim finding that appellant had no work-related disability after March 12, 1980, when he stopped work.

The Board finds that appellant is entitled to compensation for disability from March 12 until March 27, 1980 and from March 31 until April 3, 1980.

A person who claims benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his claim, including the fact that he sustained an injury while in the performance of duty and that he had disability as a result.[2]

As used in the Federal Employees' Compensation Act,[3] the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-caused impairment prevents the employee from engaging in the kind of work he was doing when he was injured.[4]

In the instant case, the evidence of record establishes that on March 12, 1980, after a discussion with his supervisor, appellant's blood pressure rose to 220/120 and appellant was sent home from work. Appellant's blood pressure was next recorded on March 28, 1980 as 120/70. Appellant attempted to return to work on March 31, 1986, and after one hour of work his blood pressure was recorded as 150/96. On April 3, 1986 appellant's blood pressure was recorded as 142/96. On April 4, 1980 appellant's blood pressure 120/70. Thereafter, none of appellant's physicians recorded a hypertensive reading. Dr. Endicott, Dr. Mullen and Dr. Farrell opined that appellant should not return to his former employment, because the conditions of his employment would precipitate episodes of hypertension, and could possibly cause appellant to suffer a stroke. The Office medical adviser and Dr. Petrin, an Office referral physician, reported that appellant was not disabled from work, however if he returned to his former employment his blood pressure would be aggravated. Finally, Dr. Gasner opined that appellant could not perform his employment duties during the time when his blood pressure was abnormally high, however that with proper medication, or reassignment to different employment appellant would not have remained disabled. The medical evidence establishes that appellant was disabled due to hypertension from March 12, 1980, until March 27, 1980 and from March 31, 1980 until April 3, 1980. Appellant is entitled to compensation benefits for the period of time during which his blood pressure was abnormally high due to his federal employment, and thus disabled him from work. The fear of a recurrence of disability is not a basis for the payment of compensation. The condition which was caused by the employment was transient to nature, and once it had resolved there was no basis for payment of future compensation.[5]

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[2] *See Daniel R. Hickman*, 34 ECAB 1220 (1983); *Clifford Eaton*, 34 ECAB 1350 (1983).

[3] 5 U.S.C. section 8102.

[4] *Frazier V. Nichol*, 37 ECAB 528 (1986).

The decision of the Office of Workers' Compensation Programs dated October 2, 1987 is hereby set aside and the case remanded for payment of benefits consistent with this decision.[6]

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[5] *Dorothy A. Jackson*, 33 ECAB 405 (1982).

[6] The Board notes that appellant is entitled to payment of benefits for work days during the outlined time periods.

In the Matter of JOHN E. ROWLAND *and* DEPARTMENT OF THE AIR FORCE, COLUMBUS AIR FORCE BASE, MISS.

Docket No. 87-1756, issued September 19, 1988

ORDER GRANTING REMAND

On July 30, 1987 appellant filed an application for review of a November 18, 1986 decision of the Office of Workers' Compensation Programs. The appeal was docketed as No. 87-1756. The November 18, 1986 decision finalized an Office preliminary overpayment decision dated July 25, 1986 which found that appellant was at fault in the creation of an overpayment of compensation in the amount of $2,514.02 which occurred when his health benefits, which had been erroneously terminated by the employing establishment, were restored by the Office retroactive to December 7, 1974.

On June 7, 1988 the Board requested a legal memorandum on the issues of (1) whether the Office determined that an overpayment existed based upon either an Office policy, or a policy of the Office of Personnel Management, that health deductions must be retroactive to the date that compensation began; and (2) whether appellant could be deemed at fault with respect to the overpayment under the Office's FECA Procedure Manual or Board case law.

On July 8, 1988 the Director of the Office filed a motion to remand the case for further development. With regard to the first issue noted by the Board, the Director stated that the Office of Personnel Management took the position that health benefit deductions from compensation payments must be retroactive to the date the deductions ceased and, therefore, it was OPM policy which required the Office to treat underdeductions of health benefits as overpayments of compensation and to provide the same procedures to these overpayments as for overpayments arising under other circumstances. With regard to the second issue, the Director stated that the Office erred in finding that appellant was at fault in the creation of the overpayment and had concluded that appellant was now without fault. The Director requested that the case record be returned to the Office upon which the November 18, 1986 decision would be vacated and a *de novo* decision issued finding appellant without fault in the creation of the overpayment. Thereafter, the Office will further develop the case for consideration of waiver of the overpayment and recomputation of the amount of the overpayment.

Appellant was served with a copy of the Director's motion but did not respond within the allotted time.

The Board has duly considered the matter and concludes that the Director's motion should be granted.

IT IS ORDERED that the November 18, 1986 decision of the Office of Workers' Compensation Programs be set aside; the case is remanded to the Office for further development in conformance with the Director's motion to be followed by a *de novo* decision in order to preserve appellant's right of appeal.

In the Matter of JOHN W. NORMAND *and* U.S. POSTAL SERVICE, POST OFFICE, Alexandria, La.

Docket No. 88-1328; Submitted on the Record;
Issued September 22, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant had any disability after March 15, 1988 causally related to his July 23, 1983 employment injury.

On July 23, 1983 appellant, then a 39-year-old clerk, injured his left shoulder when unloading a truck and throwing a sack over a conveyor belt. Appellant stopped work the same day and was seen in the hospital emergency room.

On July 25, 1983 appellant came under the care of Dr. C.W Lowrey, a Board-certified orthopedic surgeon. The diagnoses were:

> "(1) Probable, reduced dislocation, left shoulder; (2) ulnar neuritis secondary to sling with pressure at ulnar notch; and (3) degenerative disc disease, cervical spine with degenerative arthritis."

Appellant returned to limited duty on August 18, 1983 with restrictions of no work above shoulder level.

Electromyography and nerve conduction studies performed on September 1, 1983 correlated with a "mild degree of compressive neuropathy of the left ulnar nerve at the elbow region."

In November 1983 Dr. Lowrey referred appellant to Dr. Michael E. Brunet, a Board-certified orthopedic surgeon, for consultation. Appellant's history revealed that a gun exploded into his left shoulder in 1963 and required surgery. He apparently had recurrent dislocations and underwent a shoulder reconstruction in 1971. Dr. Brunet's impression was that appellant had a "cervical pathology" which was "complicated by the fact that he localizes his ulnar nerve symptoms at the olecranon notch."

On February 19, 1984 appellant underwent an anterior shoulder reconstruction. He was discharged from the hospital on February 21, 1984 with anticipated temporary total disability for six weeks.

On September 18, 1984 appellant had one of the two staples removed from his left shoulder.

A repeat electromyography and nerve conduction study was performed on December 18, 1984. Compared with the 1983 study, "the slowing across the left elbow [was] mildly more pronounced."

On July 12, 1985 appellant underwent a transposition of the ulnar nerve.

On August 21, 1985 Dr. Brunet opined that appellant had "reached maximum improvement." Appellant was still "partially dislocating or subluxation" and had "a deficit in the anterior fibers of his deltoid." Dr. Brunet concluded that appellant should not use his arm above the horizontal plane or do any heavy lifting greater than 50 pounds with his shoulder.

By decision dated March 25, 1986 the Office granted appellant a schedule award for 26 percent permanent impairment to his left shoulder, covering the period November 15, 1985 to June 5, 1987. Upon receipt of additional medical evidence, the Office amended the schedule award and increased the award to 39 percent permanent impairment of the left shoulder. The award covered the period from November 15, 1985 to March 15, 1988.

In an undated letter received by the Office on August 22, 1986, appellant stated that the employing establishment had terminated his employment. He stated that his job was changed and this "caused many job-related problems because of [his] injury."

On an Office Form EN1032-0185 which requested his employment during the previous 15-month period, appellant indicated on August 22, 1986 that he was employed from September 1983 through August 1986 at the employing establishment. He stated that he was terminated in August 1986 "because of my injury and because of my attendance record."

By letter dated December 3, 1987 the Office requested the employing establishment to provide the effective date of appellant's termination and the reasons for the termination. The employing establishment submitted the following December 11, 1987 responses:

> "In his letter of proposed removal, Mr. Normand was charged with displaying menacing behavior toward a supervisor in addition to unofficial use of government property or services. Mr. Normand's separation was processed, on a Form 50, due to threatening or endangering the physical well-being of a fellow employee.
>
> "Mr. Normand's separation had nothing to do with his on-the-job injury. His light-duty position would still be available had his attitude toward his fellow employees been acceptable."

By compensation order dated April 19, 1988 the Office found that appellant was not entitled to compensation after March 15, 1988 because his removal from work was due to disciplinary reasons and not due to his disability. The Office stated that appellant continued to be entitled to medical treatment.

The Board finds that appellant did not have any disability causally related to his July 23, 1983 employment injury after March 15, 1988.

Section 8102(a) of the Federal Employees' Compensation Act [1] sets forth the basis upon which an employee is eligible for compensation benefits. That section provides:

> "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting

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[1] 5 U.S.C. section 8102(a).

> from personal injury sustained while in the performance of his duty. . . ."

In general the term "disability" under the Federal Employees' Compensation Act means "incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury."[2] This meaning, for brevity, is expressed as "disability for work."[3]

Appellant would be entitled to compensation upon expiration of his schedule award, on March 15, 1988, if he was still disabled;[4] *i.e.*, if he was unable to earn the wage that he was receiving on July 23, 1983.

The record reveals that the employing establishment provided work for appellant within the work restrictions outlined by his physician, Dr. Brunet. Appellant was terminated from his position by the employing establishment in August 1986 because of "menacing behavior toward a supervisor" and "unofficial use of government property." The employing establishment specifically stated that employment within appellant's work restrictions would still be available to him if his attitude toward his fellow employees had been acceptable. There is no evidence in the record that appellant was terminated due to his physical inability to perform his assigned duties, nor is there evidence that appellant stopped work due to his physical condition. As there is no evidence in the record that appellant was not capable of performing his assigned duties after March 15, 1988, he had no disability within the meaning of the Act.[5]

The April 19, 1988 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[2] *Gene Collins*, 35 ECAB 544 at 548 (1984).

[3] *Clarence D. Glenn*, 29 ECAB 779 at 781 (1978).

[4] *See Goldie Washington*, 31 ECAB 239 (1979).

[5] *See Willie R. Foster*, Docket No. 85-1472 (issued December 30, 1986).

In the Matter of HELEN E. TSCHANTZ *and* U.S. POSTAL SERVICE, POST OFFICE, Des Moines, Iowa

Docket No. 88-1138; Submitted on the Record;
Issued September 22, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. section 8128 constituted an abuse of discretion.

On April 15, 1986, appellant, a 30-year-old mailhandler, filed an occupational disease claim alleging that she developed carpal tunnel syndrome in her right wrist due to factors of her federal employment. Appellant stated that she first became aware of this condition on April 1, 1986 and of its relationship to her employment on April 14, 1986. Appellant submitted with her claim the report of an emergency room physician at Mercy Hospital Medical Center who examined appellant on April 15, 1986 in response to her complaints of pain in her right hand which she attributed to lifting heavy mail bags at work and diagnosed "right hand pain, rule out carpal tunnel."

By letter dated May 13, 1986 the Office of Workers' Compensation Programs requested additional information from appellant regarding her claim. Specifically, the Office requested that appellant submit a detailed description of the particular employment conditions and factors which she believed contributed to the development of her condition and a detailed narrative report from her physician which report included the physician's opinion, supported by medical rationale, favoring causal relationship between her condition and her employment factors and which also included results of any x-rays, laboratory or diagnostic tests performed.

In response to the request of the Office, appellant submitted a letter dated June 12, 1986 in which she stated that her job as a mailhandler requires her to perform, on a daily basis, a number of repetitious tasks involving the use of her hands such as opening, closing, tagging, lifting and carrying bundles of mail weighing, on the average, 40 pounds and that she believed the performance of these duties contributed to the development of her carpal tunnel syndrome.

With respect to medical evidence, appellant submitted her March 25, 1985 preemployment medical report, and the May 22, 1986 attending physician's report and the July 21, 1986 narrative report of her treating physician, Dr. Ala E. Daghestani, a surgeon. In the May 22, 1986 attending physician's report, Dr. Daghestani diagnosed right carpal tunnel syndrome, attributed this condition to appellant's duties as a mailhandler which he described as "lifting bags weighing approximately 70 pounds," reported that he had performed right carpal tunnel release surgery on April 26, 1986 and stated that appellant was totally disabled for employment from April 21, 1986 to June 4, 1986. In the July 21, 1986 report, Dr. Daghestani stated that he first examined appellant on April 21, 1986 in response to her complaints of pain in her right wrist and that she underwent electromyogram (EMG) examination on April 23, 1986, the results of which, Dr. Daghestani reported, confirmed his diagnosis of right carpal tunnel syndrome. Dr. Daghestani concluded his report stating that he believed appellant's condition "is most probably job related in this particular case due to the fact that [she] did not have it before she was working as a mailhandler and the carpal ligament became hypertrophic thickened causing pressure on the median nerve beneath it."

By compensation order dated August 13, 1986, which incorporated a memorandum summarizing the evidence of record, the Office denied appellant's claim for compensation on the basis that she failed to discharge her burden of proof in establishing that her right carpal tunnel syndrome is causally related to factors of her employment. The Office found that the July 21, 1986 report of Dr. Daghestani was speculative on the issue of causal relationship noting that he concluded that appellant's condition "was probably job related" and that his opinion was also based on a description of employment factors different from those described to the Office by appellant. The Office also noted that Dr. Daghestani reported that an April 23, 1986 EMG confirmed his diagnosis of carpal tunnel syndrome but did not submit the results of the EMG as requested by the Office and which results are required to be submitted pursuant to FECA Bulletin 84-75.[1]

Subsequent to the issuance of this decision, appellant requested Mercy Hospital Medical Center to release copies of all her medical records to the Office which it did and which were received by the

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[1] Federal (FECA) Bulletin No. 84-75 (issued December 20, 1984) provides in relevant part that: "Before a claim is accepted for carpal tunnel syndrome, the claims examiner should require the claimant to submit a medical report which contains the following clinical and laboratory results * * * decreased muscle motor activity as measured by electromyography (EMG)."

Office on January 7, 1987. Appellant's hospital records contained a number of reports unrelated to appellant's right carpal tunnel syndrome but those reports which addressed this condition included the April 15, 1986 emergency room hospital report which included the results of x-rays taken that same date and which were reported as showing no evidence of fracture, dislocation or other bone pathology. The hospital records also contained the April 25, 1986 hospital admission report of Dr. Daghestani which disclosed findings upon examination, diagnosed right carpal tunnel syndrome but rendered no statement on casual relationship and the April 25, 1986 operative report of Dr. Daghestani which solely described the release of right carpal tunnel ligament surgical procedure. The records also included the results of the April 23, 1986 EMG which were reported as showing "an active carpal tunnel syndrome present right" and the results of April 23, 1986 motor nerve conduction velocity (NVC) studies which were also interpreted as showing active carpal tunnel syndrome on the right.

Appellant subsequently submitted the March 16, 1987 report of Dr. Michael J. Shaenboen, an osteopath specializing in neurology and neuromuscular diseases, to whom appellant was referred for neurological evaluation. In his report, Dr. Shaenboen noted appellant's complaints of, *inter alia*, the return of numbness in her right hand and aches and pains in her right wrist and occasionally similar symptoms in the left wrist,[2] disclosed findings upon examination and diagnosed evidence of bilateral carpal tunnel syndrome, somewhat worse on the right, but rendered no statement on causal relationship.

By letter dated February 11, 1988, appellant formally requested reconsideration of the Office's August 13, 1986 decision and in support of this request submitted additional copies of the March 24, 1985 preemployment medical report, and the April 15, 1986 emergency room report, the results of the April 23, 1986 NCV studies and the February 8, 1988 report of Dr. Daghestani which repeated, almost verbatim, statements made in his July 21, 1986 report including the opinion he rendered at that time on causal relationship and did not expand any further on this opinion.

By compensation order dated March 3, 1988, which incorporated a memorandum summarizing the evidence, the Office denied appellant's request for reconsideration on the basis that, with the exception of the results of the EMG and NVC studies, the evidence submitted by appellant was cumulative and repetitious and not sufficient to reopen the case and perform a merit review. In the memorandum, the Office noted that the evidence submitted by appellant "was mostly cumulative or repetitious in nature" and that the case record still lacked a rationalized medical opinion supporting causal relationship.

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[2] The report of Dr. Shaenboen indicates that his examination of appellant was not solely to determine the cause of her complaints of pain in her right and left hands and wrists but also to determine the cause of her complaints of low back and leg pain.

The only issue which the Board may address on appeal is the issue addressed by the Office in its March 3, 1988 decision which found that the evidence submitted by appellant in support of her request for reconsideration was insufficient to require a merit review of the Office's August 13, 1986 decision. The Board does not have jurisdiction to render a decision on the issue addressed by the August 13, 1986 decision of the Office, which is whether appellant has met her burden of proof in establishing that her right carpal tunnel syndrome is causally related to factors of her employment, because the August 13, 1986 decision was issued more than one year before appellant filed her appeal. The Board's jurisdiction is limited to review of final decisions of the Office issued within one year from the date a claimant files an appeal.[3]

The Board finds that the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. section 8128.

To require the Office of Workers' Compensation Programs to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence and contentions are present, it is well-established under Board precedent, that the Office is required to reopen a case on its merits.[4]

In support of her request for reconsideration, appellant submitted, *inter alia,* several medical reports not of record at the time of the Office's August 13, 1986 decision including the April 25, 1986 hospital admission report and the April 25, 1986 operative report of Dr. Daghestani, a surgeon and appellant's treating physician, and the March 16, 1987 report of Dr. Schaenboen, an osteopath. While all four of these reports diagnosed carpal tunnel syndrome, none addressed the issue of causal relationship and, therefore, did not offer any relevant information not already before the Office at the time of its August 13, 1986 decision. While the February 8, 1988 report of Dr. Daghestani, also submitted by appellant in support of reconsideration, addressed the issue of causal relationship, his opinion on causal relationship in this report was identical to the opinion given in his July 21, 1986 report which was before the Office at the time of its August 13, 1986 decision. The Office, therefore, correctly categorized all the foregoing reports as cumulative and repetitious of evidence already of record.

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[3] *See* 20 C.F.R. section 501.3(d)(2).

[4] *Ethel D. Curry,* 35 ECAB 737 (1984); *see also* 20 C.F.R. section 10.138(b).

Appellant, however, also submitted in support of her request for reconsideration the results of the electromyogram and nerve conduction velocity studies performed on appellant on April 23, 1986 which the Office, in its August 13, 1986 decision, stated was required by FECA Bulletin No. 84-75 for the adjudication of a carpal tunnel syndrome claim.[5] If such evidence is required by the Office in the adjudication of appellant's claim for employment-related carpal tunnel syndrome then such evidence is relevant and if not previously of record and considered by the Office in its prior decision then such evidence is new and the submission of the new relevant evidence warrants a merit review. The Office acknowledged in its March 3, 1988 decision that the results of the April 23, 1986 EMG and NVC studies were not previously of record and therefore a merit review is warranted in appellant's case based on the submission of such evidence.

The Office denied appellant's request for reconsideration on the basis that the evidence submitted by appellant "was mostly cumulative or repetitious in nature." This is not a proper basis for determination of whether a merit review is warranted in a particular case. Evidence submitted in support of reconsideration is not weighed to determine whether or not the majority of such evidence is cumulative, duplicative or repetitious. If a claimant submits evidence which is relevant and not previously of record then, regardless of the number of additional reports or documents submitted which may be of no evidentiary value, the Office is nevertheless required to conduct a merit review of the case. The Office also noted in the memorandum that appellant had still not submitted a rationalized medical opinion supporting causal relationship. The requirements for reopening a claim for a merit review do not include the requirement that a claimant submit *all* evidence which may be necessary to discharge his or her burden of proof. Again the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[6] Accordingly, it was improper for the Office to refuse to review the instant case on the merits.[7]

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[5] *See* note 1 *supra.*

[6] *See* 20 C.F.R. section 10.138(b).

In view of the foregoing, appellant's case shall be remanded to the Office for consideration of the April 23, 1986 EMG and NCV results and for issuance of an appropriate *de novo* decision on appellant's February 11, 1988 request for reconsideration which is based on the proper standard of review.

The decision of the Office of Workers' Compensation Programs dated March 3, 1988 is hereby reversed and the case remanded for further action in accordance with this decision.

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[7] The Board finds the case record contains a December 10, 1987 occupational disease claim for carpal tunnel syndrome of the left wrist. The record does not contain a final decision on this claim and therefore it is not subject to review by the Board. *See* 20 C.F.R. section 501.2(c).

In the Matter of RONALD I. ROMANO *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Los Angeles, Calif.

Docket No. 88-3; Submitted on the Record;
Issued September 26, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment of compensation during all or any portion of the period August 22, 1983 through June 7, 1986; and (2) if so, whether appellant was not without fault with respect to the overpayment.

On January 9, 1980, appellant, then a 46-year-old air traffic controller, filed a claim for compensation for back strain which he alleged he sustained earlier that day when the chair on which he was sitting fell backwards. Appellant stopped work on January 9, 1980 and returned to work on March 24, 1980. Based on the medical evidence submitted, the Office of Workers' Compensation Programs accepted appellant's claim for low back strain and authorized payment to appellant of continuation of pay for the period January 10, 1980 through February 23, 1980 followed by payment of compensation for temporary total disability for the period February 24, 1980 through March 23, 1980. The record indicates appellant sustained intermittent periods of disability during the period March 24, 1980 through July 5, 1981 which were accepted by the

Office as being causally related to his January 9, 1980 employment injury. The record further indicates that on or about July 5, 1981, the Office determined that appellant was temporarily totally disabled for work and placed him on the automatic compensation rolls effective July 12, 1981.

By form letter CA-1653 dated April 2, 1983, the Office informed appellant that the compensation he was currently receiving was based upon total disability and that if he was ever able to resume his regular work, compensation would cease and that if he was ever unable to resume his regular work due to partial disability resulting from his accepted injury, his compensation would be computed on his loss of wage-earning capacity caused by the partial disability that remained. The Office also stated that if "at some time in the future your condition improves to the point where you are able to perform some type of work, it will be necessary to redetermine the amount of your entitlement." By form letter CA-1049 also dated April 2, 1982 the Office set forth the conditions under which compensation would be paid and advised appellant that:

> "In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you return to work."

Appellant signed the reverse side of the CA-1049 form letter on April 12, 1982, indicating that he agreed to be bound by the Office's conditions for receipt of compensation.

By letter dated April 12, 1982, appellant requested reevaluation of the Office's computation of his disability payments and stated, *inter alia*, that his review of Office publication CA-550 ("Questions and Answers About FECA") indicated that the Office did not consider all applicable pay components in determining his pay rate for compensation purposes. By letter dated April 29, 1982 the Office requested additional information from the employing establishment regarding appellant's pay and upon receipt of such information adjusted appellant's compensation payments to reflect all pay components applicable to his case and by letter dated August 13, 1982, advised appellant that his compensation payments had been adjusted to reflect all pay components, advised him of the specific adjustments made and stated that he would receive a lump sum payment for retroactive adjustment to compensation already paid.

The record indicates that in May 1983, pursuant to authorization of the Office, appellant entered a private vocational rehabilitation program. By letter dated September 6, 1983 appellant's vocational consultant informed the Office that effective August 22, 1983, appellant was employed as a "flex-time" foundry worker and that appellant was preparing to enter into independent general contractor business and that, therefore, appellant's rehabilitation program was being terminated.

On a CA-1032 form dated September 6, 1983 appellant reported that he had been self-employed since August 22, 1983 in quality control work earning $5.00 per hour for 40 hours per week. With his form CA-1032, appellant submitted a letter dated September 6, 1983 advising the Office that he had submitted his resignation to the employing establishment, that he contracted to provide quality control service at $200.00 per week and that it was his understanding that he would continue to receive "wage loss protection until [his] earnings capacity is restored." In response to appellant's September 6, 1983 letters, an Office claims examiner, by letter dated September 20, 1983, advised appellant in relevant part as follows:

> "With reference to determination of wage loss compensation, we have not yet made a decision in your case. You may continue earning presently and for a short time we will continue payment of compensation in a total disability capacity. It is anticipated we will use the services of another rehabilitation group to assist in assessment of your potential employment possibilities."

On a CA-1032 form dated November 20, 1984, appellant reported that he had been self-employed as a general contractor since September 1983 earning $5.00 per hour, working 40 hours per week. On a CA-1032 form dated February 25, 1986 appellant stated that he was employed as a laborer at a company called Superior Plaster Castings during the period March 4, 1985 through March 22, 1985, earning $3.75 per hour and was self-employed as a general contractor during the period December 1984 through February 1986 (excluding the period March 4, 1985 through March 22, 1985) earning $5.19 per hour, 40 hours per week.

By letter decision dated May 9, 1986, the Office advised appellant that it was adjusting his disability compensation effective June 8, 1986 because the medical evidence showed that he was no longer totally disabled for work and that it had determined that he was able to perform the duties of general contractor and adjusted appellant's compensation based on his actual earnings as a general contractor.

By letter dated November 28, 1986, the Office notified appellant that a preliminary determination had been made that he had received an overpayment of compensation in the amount of $22,169.22 which occurred because he was paid temporary total disability while receiving wages. The Office informed appellant that a preliminary finding had been made that he was at fault with respect to the overpayment, because he should have known that he was not eligible to receive compensation for temporary total disability while working. The Office advised appellant that this was not a final decision and further advised of the manner in which he may refute the preliminary determination of an overpayment and of his right to request a prerecoupment hearing. The Office requested that appellant submit detailed financial information because in the event it was determined by final decision that the overpayment must be recovered, the financial information would assist the Office in determining the manner of recovery of the overpayment and in this regard, the Office enclosed for appellant's completion an overpayment recovery questionnaire (Form OWCP-20). The Office requested that appellant respond to the preliminary determination of an overpayment within 30 days from the date of the letter.

On January 6, 1987 the Office received appellant's request for a hearing together with a statement that he was not at fault with respect to the overpayment and a copy of his 1985 federal tax business return. With respect to the issue of fault, appellant stated that he was not at fault in the matter of the overpayment and, in support of this contention, quoted the portion of the Office's September 20, 1983 letter which stated that: "he may continue earning presently and for a short time we will continue payment of compensation in a total disability capacity." Appellant further stated that he had reported all employment during the period in question as requested by the Office.

At the hearing held on May 20, 1987 appellant testified that he did not believe that his disability compensation was correctly computed, that he relied on the September 20, 1983 letter of the Office and therefore had no idea that he was not entitled to the compensation checks received subsequent to this letter. Also at the hearing, the Office hearing representative read a July 1, 1983 report from appellant's vocational consultant which stated as follows:

> "Previously, it was [appellant's] impression that upon completion of the month of May 1983, his disability benefits would in all probability cease. I explained to him that following a con-

> versation with the [Office] he is entitled to continued supplemental benefits, which would fluctuate according to the amount of income he is receiving from other sources. I requested that he provide a definite framework of his intended employment training before submission to the [Office] in order to assess his entitled benefits should a rehabilitation claim be developed."

At the conclusion of the hearing, the Office hearing representative informed appellant that even if the final decision found appellant to be without fault in the matter of the overpayment, such finding would not mean an automatic waiver of the overpayment, that waiver of the overpayment, where an individual is found to be without fault, is based on the financial circumstances of the overpaid individual. The Office hearing representative requested that appellant submit more detailed financial information and advised that the record would be held open for 30 days to allow for the submission of additional evidence.

Subsequent to the hearing, appellant submitted a completed overpayment recovery questionnaire listing his income and expenses and on which he reiterated that he was not at fault in the matter of overpayment and disputed the Office's computation of his disability compensation stating that the "full benefits" he received never equaled the amount he was earning in his job. Appellant attached to the overpayment recovery questionnaire supporting documentation regarding his income and expenses, a statement explaining certain items listed on the questionnaire and a statement more fully disputing the finding of fault in which he reiterated that he relied on information provided by the Office's letter of September 20, 1983.

By decision dated October 7, 1987 and finalized October 8, 1987, the Office hearing representative concluded that appellant received an overpayment of compensation and that the overpayment was properly computed at $22,169.22, the difference between compensation based on total disability paid appellant for the period August 22, 1983 through June 7, 1986, $73,904.97, and compensation based upon appellant's loss of wage-earning capacity, $51,735.75, to which he was entitled for this period. In addition, the hearing representative concluded that appellant was not without fault with respect to the overpayment because he accepted payments to which he knew or should have known he was not entitled. The representative reasoned that:

> "[Appellant], in view of the contacts he had had with the Office and with the rehabilitation counselor, reasonably should have known and in actuality did know that continued payments at the rate he had received prior to having earnings from his business were incorrect. On that basis alone he cannot be considered without fault in the matter of the overpayment. He is thus ineligible for waiver under the provisions of section 8129(b) of the Federal Employees' Compensation Act."

The hearing representative concluded that the September 20, 1983 letter only stated that appellant could continue to receive total disability for a short time; not for almost three years. The hearing representative also concluded, based upon the financial information provided by appellant, that he was capable of repaying the full amount of the overpayment in one lump sum or, in the alternative, the Office should deduct the amount of appellant's continuing compensation check until such time as the total amount of the overpayment is absorbed and that recovery should commence within 60 days from the date of the decision.

The Board finds that appellant received an overpayment of compensation during a portion of the period August 22, 1983 through June 7, 1986 and that he was not without fault with respect to the overpayment.

On appeal, the Board requested that the Director of the Office of Workers' Compensation Programs submit a legal memorandum addressing the issues of: (1) whether the Office's letter of September 20, 1983 constituted "misinformation" within the meaning of section 10.320(c)(1) of Title 20 of the Code of Federal Regulations;[1] and (2) whether the September 20, 1983 letter can be deemed to have modified or superseded form letter CA-1049 dated April 2, 1982 which advised appellant to return any compensation checks received after his return to employment.

In response to this request, the Director of the Office submitted on June 28, 1988 a motion to remand in part and affirm in part the Office's October 8, 1987 decision. In this motion, the Director stated that the Office's September 20, 1983 letter did not contain any misinformation and that the Office had in fact permitted appellant to continue to receive compensation for temporary total disability concurrently with actual earnings for a "short time" and that therefore 20. C.F.R. section 10.320(c)(1) was not applicable to appellant's case. The Director found, however, that the September 20, 1983 letter partially modified the terms of the April 2, 1982 CA-1049 form letter but only to the extent that appellant was not "immediately" required to return any compensation checks received after his return to employment on August 22, 1983 and submitted that the period of six months would be an equitable interpretation of the phrase "for a short time" and, assuming acceptance of such interpretation by the Board, it would be reasonable for appellant to have accepted compensation for temporary total disability concurrently with his receipt of wages from August 22, 1983 through February 22, 1984. The Director further submitted that the circumstances of the case did not warrant a finding that appellant was without fault in the matter of the overpayment because the September 20, 1983 letter did not release appellant from his recognized obligations as set forth in the April 2, 1982 CA-1049 form letter. The Director requested that the Board set aside that portion of the October 8, 1987 decision regarding the amount of the overpayment and remand the case for recalculation of the overpayment received during the period February 23, 1984 through June 7, 1986 but affirm the decision in all other respects.

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[1] 20 C.F.R. section 10.320(c)(1) provides in relevant part that in determining whether an individual is "without fault" the Office must take into consideration whether "the individual relied on misinformation given to him or her (or his or her representative) by an official source within the Office (or other governmental agency which the individual had reason to believe was connected with administration of benefits) as to the interpretation of a pertinent provision of the Act or the regulations pertaining thereto."

Appellant was served with a copy of the Director's motion and responded by letter dated July 26, 1988. In this letter, appellant argued that the instructions in the April 2, 1982 CA-1049 form letter stating "return to us any compensation check received after you return to work" meant after you return to work at the employing establishment and not to "any type of general work" and such interpretation was supported by the language on the reverse side of the CA-1049 letter. Appellant also reiterated that his disability compensation payments had not been correctly computed.

The Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record and is in agreement with the findings and conclusions of the Director as set forth in his June 28, 1988 motion.

The Board therefore finds that appellant received an overpayment of compensation during the period February 23, 1984 through June 7, 1986.

In the instant case, the Office determined that appellant was temporarily totally disabled due to his January 9, 1980 employment injury, paid him compensation for total disability and placed him on the automatic compensation rolls effective July 12, 1981. In September 1983, appellant informed the Office that he began work as a general contractor on August 22, 1983. Upon receipt of this information, the Office advised appellant that his disability compensation would be adjusted to reflect his wage-earning capacity based on his actual wages. However, the Office inadvertently continued to pay appellant, through June 7, 1986, disability compensation based on temporary total disability to which appellant was no longer entitled because he had returned to employment. Therefore, appellant received an overpayment of compensation.

The Director of the Office has submitted that the Office, by its letter dated September 20, 1983, expressly permitted appellant to receive compensation for temporary total disability while earning wages "for a short time" and that such phrase should be interpreted to mean six months which makes the applicable period in which an overpayment occurred, February 23, 1983 to June 7, 1986.

The Board accepts the period of six months in this case as a reasonable and equitable interpretation of the phrase "for a short time" and therefore finds February 23, 1984 through June 7, 1986 to be the period in which an overpayment occurred and remands the case for a determination of the amount of overpayment received by appellant during that period.

Appellant contends that he received an underpayment of compensation and that a computation of an overpayment, if any, cannot be correctly determined until the Office has correctly calculated the amount of compensation to which he was entitled during his period of temporary total disability. Appellant has alleged that his compensation for total disability was less than what he was making at the employing establishment and that he "never made as much money combining what [he] earned with [his] FECA payment against what [he] earned at [his] old job."

Compensation for total disability does not reimburse a claimant, found to be totally disabled, for the full amount of wages lost due to the employment-related disability but rather provides payment of a percentage of wages lost with the exact percentage, the compensation rate, determined by whether or not the claimant has dependents as such term is defined in the Act.[2]

The record establishes that by form letter CA-1049 dated April 2, 1982 the Office set forth its computation of appellant's compensation payments for total disability which showed that appellant was paid compensation at a percentage rate of 75 percent. By letter dated April 12, 1982 appellant requested that the Office reevaluate its computation of his compensation payments noting that his pay rate did not include all applicable pay components in accordance with Office publication CA-550 ("Questions and Answers About FECA"). The record also establishes that the Office did reevaluate its computation of appellant's disability compensation payments and by letter dated August 15, 1982 informed appellant that his monthly compensation payments had been adjusted to reflect all pay components applicable to his case, described the computations made and stated that he would receive a lump sum payment for retroactive adjustment to compensation already paid. The record indicates that appellant raised no further questions about the amount of his disability payments until the overpayment was declared. The Board notes that the Office hearing representative, in the October 8, 1987 decision, carefully reviewed the manner in which the Office determined appellant's compensation payments for temporary total disability and loss of wage-earning capacity. The Board also notes that other than alleging that the Office's calculations with respect to such payments were incorrect, appellant has not explained or submitted documentation showing how such calculations were incorrect.

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[2] *See* 5 U.S.C. sections 8105, 8110, 8112; 20 C.F.R. sections 10.300 through 10.303 (revised April 1, 1987).

The Board further finds that appellant was not without fault with respect to the overpayment and therefore the overpayment is not subject to waiver.

Section 8129(a) of the Act [3] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." [4] No waiver of overpayment, however, is possible if the claimant is not without fault in helping to create the overpayment.

In determining whether an individual is not without fault or, alternatively, "with fault" section 10.320 of Title 20 of the Code of Federal Regulations states in relevant part:

> "An individual is with fault in the creation of an overpayment who:

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[3] 5 U.S.C. section 8129(a).

[4] 5 U.S.C. section 8129(b).

> '(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
>
> '(2) Failed to furnish information which the individual knew or should have known to be material; or
>
> '(3) With respect to the overpaid individual only, accepted a payment which the individual either knew or should have been expected to know was incorrect.' "[5]

In the instant case, the Office applied the third standard finding that appellant knew or should have known that the compensation checks for temporary total disability which he received for a period of almost three years, during which time he also received wages from employment, were incorrect.

Appellant contends that he should not be held at fault because he relied on the Office's letter of September 20, 1983 which permitted him to continue to receive concurrently both wages and compensation for temporary total disability. However, the September 20, 1983 letter clearly establishes that this permission to receive wages and compensation concurrently was granted for a "short time" and the Board finds that it was not reasonable on the part of appellant to assume that a "short time" meant an indefinite period of time or a period of almost three years.

Appellant also contends that his disability compensation was so much less than earnings received while working that he assumed that he had always been paid at a wage-earning capacity rate rather than a total disability rate and therefore was unaware that his compensation checks were incorrect. Such assumption is not supported by the evidence of record. The Office's CA-1653 form letter dated April 2, 1982 clearly advised appellant that his compensation was based on a total disability rate and the Office's CA-1049 form letter also dated April 2, 1982 set forth the computation of appellant's total disability payments. Appellant, in his letter dated April 12, 1982, submitted in response to the Office's April 2, 1982 CA-1049 form letter, questioned the Office's computation of his disability payments stating that he believed his pay rate, for compensation purposes, did not include all applicable pay components as set forth in the Office's publication CA-550. Appellant did not indicate in his April 12, 1988 letter that he believed his compensation payments were based on an incorrect compensation rate,

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[5] 20 C.F.R. section 10.320(2) (revised April 1, 1987).

i.e., a wage-earning capacity rate as opposed to a total disability rate.

Appellant also contends that the April 2, 1982 CA-1049 form letter which instructed him to return to the Office any compensation checks received after he returned to work meant after he returned to work at the employing establishment and that he therefore was unaware that he had to return compensation checks received subsequent to commencing any other type of employment. Form letter CA-1049 does not state that compensation checks must be returned only after return to employment with the employing establishment. Nevertheless any ambiguity perceived by appellant in this letter, should have been clarified by form letter CA-1653 also dated April 2, 1982 and by the Office's September 20, 1983 letter. In form letter CA-1653, the Office advised appellant that if his condition improved such that he was able to perform some type of employment, it would be necessary for the Office to redetermine the amount of his compensation payments. The Office's September 20, 1983 letter acknowledged receipt of appellant's letter stating that he was currently employed, clarified that the Office was still paying appellant compensation based on total disability and that for a short time, pending the Office's redetermination of his compensation based on his wage-earning capacity, he could continue to receive compensation for total disability. These two letters made clear that once appellant resumed employment, regardless of the employer or the type of employment, he would no longer be entitled to compensation based on total disability and his compensation payments would be reduced from a total disability rate to a wage-earning capacity rate.

In determining whether an individual is with fault in the matter of an overpayment, section 10.320 of Title 20 of the Code of Federal Regulations requires the Office to consider all pertinent circumstances, including age, intelligence, education and physical and mental condition.[6] The Board notes from the record that appellant is college educated, that he scored "above average" on intelligence tests administered by the private vocational consultant, and that his letters to the Office, prior to the matter of the overpayment, do not indicate any confusion or misunderstanding with respect to Office procedures regarding his compensation payments or his obligations with respect to entitlement and receipt of such payments. Under these circumstances, the Board finds that appellant knew or should have been expected to know that the continued issuance of compensation checks for temporary total disability, long after the Office advised appellant in its September 20, 1983 letter that such checks would continue only for a short time, was incorrect and that he was not entitled to such checks. Appellant is therefore found to be not without fault in the matter of the overpayment and where an appellant is found to be not without fault, there can be no waiver of the overpayment.

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[6] *Id.*

Appellant further contends that the Office created the overpayment by continuing to issue him compensation checks based on a total disability rate rather than a wage-earning capacity rate and he should not be held responsible for the Office's error. The Board has held that although the overpayment may result due to negligence or error on the part of the Office or administering agency, this does not excuse a claimant from accepting a check to which he knew or should have been expected to know he was not entitled.[7]

The decision of the Office of Workers' Compensation Programs dated October 7, 1987 and finalized October 8, 1987 is set aside and the case remanded for a *de novo* decision on the amount of overpayment received by appellant during the period February 23, 1984 through June 7, 1986. The decision is affirmed in all other respects.[8]

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[7] *See Lynden F. Moser*, 37 ECAB 725 (1986); *Robert W. O'Brien*, 36 ECAB 541 (1985).

[8] Through this decision and order, the Board has, in essence, granted the Director's motion to remand in part and affirm in part and, therefore, finds it unnecessary to issue a separate order on the Director's motion.

In the Matter of GURCHARAN DEHAL *and* U.S. POSTAL SERVICE, POST OFFICE, Orinda, Calif.

Docket No. 88-1327; Submitted on the Record;
Issued September 28, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has any disability due to a July 2, 1983 employment injury subsequent to November 1, 1983, the date that the Office of Workers' Compensation Programs terminated his compensation benefits.

On July 7, 1983 appellant, then a 43-year-old postal clerk, filed a claim alleging that he sustained an emotional upset, and back and neck pain on July 2, 1983 when a supervisor's actions caused him to faint and fall to the employing establishment's floor. Appellant stopped work on the date of injury and did not return to work for several years.

A July 2, 1983 emergency room report from Dr. Ken Robinson, a Board-certified family practitioner, stated that appellant arrived at the hospital hyperventilating and anxious. Appellant reported several years of conflict with his supervisor that appellant felt was racially motivated. Appellant stated that after being reprimanded he felt faint and began to hyperventilate. Physical examination was without positive physical findings and Dr. Robinson diagnosed an acute anxiety reaction with hyperventilation.

A July 12, 1983 report from Dr. J. Kenneth Jensen, a Board-certified orthopedic surgeon and appellant's treating physician, noted first treating appellant on July 5, 1983 for complaints of low back and bilateral hip pain. Appellant also reported pain radiating into his right calf and a right-side spasm of the L4–S1 paravertebral area was noted. Dr. Jensen diagnosed radiculopathy and treated appellant with physical therapy and medication. Dr. Jensen estimated that appellant could return to work on July 19, 1983.

In a July 15, 1983 fitness-for-duty report, Dr. Willie Wilson, a specialist in internal and occupational medicine and an employing establishment physician, reported his findings based upon a July 14, 1983 examination. Dr. Wilson noted that appellant was born and educated in India and also noted appellant's complaints of harassment. Appellant recounted the July 2, 1983 employment incident and stated that after leaving the hospital he went home, went to sleep, and, upon awakening, the back of his head felt heavy and his right hip hurt. Appellant stated that he could not presently turn his head and stated that he had pain in the right hip and lumbosacral spine areas. Dr. Wilson noted that appellant was involved in a 1976 automobile accident in which Dr. Jensen treated appellant for back pain. Dr. Wilson opined that appellant had an "ego problem" that caused appellant to view himself as "super intelligent" in relation to his supervisors. Dr. Wilson found no objective evidence of physical trauma or injury and opined that appellant demonstrated the features of a conversion reaction that resulted in a cervical strain that improved with treatment. Dr. Wilson opined that appellant did not sustain a work-related traumatic injury but also opined that appellant was not "suitable" to carry out his employing establishment duties for two weeks.

In a July 19, 1983 report based upon a July 15, 1983 examination, Dr. Lin Ho, a Board-certified orthopedic surgeon to whom appellant was referred by the Office, noted appellant's present complaints of continuing back pain. Forward flexion, extension, and lateral bending were performed to approximately 80 percent of normal and sensory examination was normal. Palpation of lumbar region elicited some pain complaints. Dr. Ho reported that x-rays of the lumbar spine revealed no thinning of the intervertebral disc spaces. Arthritic changes were noted and there was no evidence of fracture or subluxation. Dr. Ho listed his impression as a back contusion but noted that the "events surrounding this . . . injury suggests that he may have had a conversion syncopal reaction." Dr. Ho stated that his examination revealed no positive objective neurologic findings and that except for tenderness in the lumbar spine and "slowness" in appellant's performance of his range of motion, there were no other findings noted. Dr. Ho opined that appellant could presently return to light-duty work and that he could return to unrestricted duty in approximately four weeks. Dr. Ho also noted that psychiatric evaluation might be in order if appellant failed to recuperate as expected.

In a July 25, 1983 report, Dr. Jensen noted certain findings from appellant's July 5, 1983 examination and noted that appellant presented with a "considerable amount of emotional distress and anxiety." After a July 18, 1983 examination, Dr. Jensen reported continued pain referable to the cervical spine but noted that appellant's lumbar spine condition had improved. Dr. Jensen stated that it was "doubtful" that appellant could return to his employment before August 15, 1983.

In an August 23, 1983 letter, the employing establishment controverted appellant's claim alleging that appellant feigned his fall and insisted that paramedics take him to the hospital. The employing establishment stated that appellant's regular position was within the light-duty restrictions imposed by Dr. Ho.

A September 27, 1983 report from Dr. Jensen noted "considerable" improvement in appellant's lumbar spine symptoms. Dr. Jensen stated that while appellant did complain of recurring symptoms in the upper cervical spine area there was marked improvement in his range of motion. Dr. Jensen reported a "considerable emotional overlay with regard to the onset of the symptoms" and the surrounding circumstances. Dr. Jensen recommended that appellant not return to work at the same employing establishment site and suggested that appellant be given a transfer to another facility. Dr. Jensen reported continued restrictions for lifting, bending, stooping, or overhead activities. Dr. Jensen opined that appellant should be able to return to work on November 1, 1983. In an

October 24, 1983 note, Dr. Jensen released appellant to return to work on November 1, 1983.

By letter dated October 26, 1983 appellant noted the events of July 2, 1983, stating that his supervisor began "yelling" at him about which duties appellant should perform before appellant fainted. This occurred on appellant's first day at a new position with the employing establishment. Appellant stated that on July 3, 1983 he experienced "severe pain" in his neck and lower back. Appellant also noted his refusal to return to work, despite his supervisor's request, after Dr. Jensen, on July 5, 1983, placed appellant "off work for two weeks."

A November 2, 1983 report from Dr. Kenneth W. Hjortsvang, Board-certified in psychiatry and neurology, stated that appellant had developed a "psychological fear or phobia about returning to work" at the employing establishment location where the July 2, 1983 incident occurred. Dr. Hjortsvang stated that appellant was not "psychologically capable" of working at that location but that he was capable of working at other locations. Accompanying Dr. Hjortsvang's report was an August 26, 1983 report in which he noted seeing appellant for six sessions between August 4 and August 22, 1983. Dr. Hjortsvang stated: "From the history I obtained from you, you have suffered a rather chronic emotional distress by the negative animosity by others while working at the [employing establishment]." Dr. Hjortsvang noted on two occasions appellant was reprimanded in such a manner as to cause a "strong psychological reaction" manifested by a heavy sensation with a pulling tension in the head causing difficulty to stand. Dr. Hjortsvang noted the July 2, 1983 employment incident but did not specify any other incident. Dr. Hjortsvang noted that the only treatment recommended was appellant's transfer to another location because of a "lessened likelihood of similar negative attitudes."

By letter dated November 2, 1983, the employing establishment issued appellant an advance notice of separation. Appellant's superintendent, quoting Dr. Hjortsvang's August 26, 1983 report, stated that he was without authority to reassign appellant to another employing establishment location.

In a March 5, 1984 report, Dr George E. Becker, Board-certified in orthopedic surgery, psychiatry, and neurology, and an Office medical consultant, opined after reviewing medical record and a statement of accepted facts that appellant likely had an anxiety disorder with somatization that was not causally related to appellant's employment. Dr. Becker opined that appellant was disabled but recommended additional examination and documentation to establish a firm diagnosis.

By letter dated June 21, 1984, the Office referred appellant, together with a statement of accepted facts and the medical record, for examination and evaluation before a multi-disciplinary panel of physicians.

A June 26, 1984 memorandum from an Office claims examiner noted that all physicians reports supported "at least" a conversion reaction.

In a July 11, 1984 report based on a July 10, 1984 examination, Dr. James B. Stark, Board-certified in physical medicine and rehabilitation, noted appellant's employment history and allegations of discrimination. After noting appellant's medical history since the July 2, 1983 employment incident, Dr. Stark stated that appellant presently experienced neck pain "very seldom" and usually as a result of insufficient sleep or sleeping in the wrong position. Appellant reported that he had not sustained back pain for "a long time" and that it only occurred upon exertion, and prolonged sitting or standing. In his assessment Dr. Stark reported "intermittent neck pain muscular," and "low back pain denied." In his discussion Dr. Stark noted that appellant's examination was "completely within normal limits with regard to strength, sensation and deep tendon reflexes." Dr. Stark reported normal range of motion in lumbar and cervical spine. Dr. Stark opined that appellant was capable of resuming his regular work and noted appellant agreed with him based on "pain alone." Dr. Stark noted that appellant was most concerned with the way he was treated at work. Dr. Stark reported a resolved contusion as his diagnosis and stated that this precluded appellant from working for "a few days."

In a July 11, 1984 report based on a July 11, 1984 examination, Dr. David L. Chittenden, a Board-certified orthopedic surgeon, noted appellant's history and reported appellant's present complaints as soreness and aching in the neck, and occasional headaches and stiffness. Appellant reported mid-back "tightness" upon bending or stooping and low back pain upon sitting for a prolonged period. In his diagnosis Dr. Chittenden reported a healed cervical strain, and a healed lumbar strain. In his discussion Dr. Chittenden stated in relevant part:

> "[Appellant] has some minimal subjective complaints and no objective findings of disability as relates to his neck or his back. It would appear that he had some type of tension neck and back strain which has long ago resolved. At most . . . [ap-

> pellant] was disabled for two weeks. . . . From an orthopedic point of view, there is no need for any work preclusions or restrictions. . . ."

In a July 11, 1984 report based on an examination of that date, Dr. Lawrence T. Petrakis, Board-certified in psychiatry and neurology, provided a psychiatric evaluation of appellant. Dr. Petrakis reported appellant's employment and medical history and that appellant did not desire to return to the same employing establishment location because of alleged harassment and discrimination. Included in the history was a prior termination of appellant by the employing establishment after four weeks as a letter carrier for reasons "not entirely clear" to Dr. Petrakis. Appellant reported that the termination was withdrawn following the filing of an EEOC complaint. Appellant reported that on an emotional basis his spirits were very good although he indicated that he was worried about his job situation. Appellant reported his sessions with Dr. Hjortsvang to be helpful. On examination, Dr. Petrakis reported no indications of anxiety, agitation, mood disturbances, illusions, hallucinations, delusions, or paranoid trends. Appellant's thought processes were coherent, relevant, and responsive to questions asked. Appellant indicated his readiness to return to work and that he felt he had no problem that would prevent him from working. Appellant's concentration and attention span were normal and he was well-oriented. In his discussion, Dr. Petrakis stated in relevant part:

> "[Appellant] is employed as a clerk with the [employing establishment] who presently is feeling reasonably well and ready to return to work. He does complain of some mild back pain and some intermittent neck pain that is not terribly disabling. . . ."

* * *

> "At the time of examination . . . [appellant] was fit to return to work. He has no particular anxiety or elements of depression at this time. He does not feel he could return to work [at the employing establishment where he last worked] because he fears a repeat of the same problem that has plagued him since 1980.
>
> "This is an occupational problem . . . and does not reflect any ongoing psychiatric difficulty in the sense that [appellant]

> has any active ongoing psychopathology that would prevent him from working in an effective fashion. This is not to state that he would do well by returning to the [employing establishment location where he last worked] because of the problems that he has experienced there. His feelings and reactions to [his former employing establishment] would be essentially normal for somebody who was expecting the worst to occur.
>
> "It would appear that [appellant] has had considerable difficulty in working for the [employing establishment]. . . . On the one hand one could assume that he had been persecuted by the [employing establishment] while on the other hand one can presume that he has a personality disorder which is productive of difficulties in the work environment. This is by virtue of his previous firing and his multiple run-ins with various bosses over a number of years.
>
> "It is difficult . . . to be certain which is the case as I only have [appellant's] perspective on this matter.
>
> "At the present time [appellant] is not experiencing any psychiatric disability that would prevent him from engaging in gainful employment on the open labor market. However, . . . he should not return to the [employing establishment location where he last worked]. Whether he is a good employee or can do his job properly is a question that would best be answered by his employer. . . . However, there is nothing psychiatrically that would prevent him from performing his job other than at [employing establishment location where he lasted worked] at this time."

In a July 12, 1984 report based on an examination of that date, Dr. Michael Kasman, Board-certified in psychiatry and neurology, provided a neurological evaluation of appellant. Dr. Kasman reported "mild" tenderness on palpation of the back but no paravertebral spasms. The examination was otherwise normal. In his discussion, Dr. Kasman stated in relevant part:

> ". . . I find no evidence for any serious disabling or significant neurological or orthopedic sequella from his injury in July 1983. He has recovered nicely from both insults, although the neck and back problems never . . . resulted in any nerve root or spinal cord compression.
>
> "At the present time there is no neurological or orthopedic reason that he cannot return to his job with no work preclusions and with no residual disability."

In a final narrative summary, signed by Drs. Petrakis, Stark, Kasman, and Chittenden and dated August 20, 1984, the multi-disciplinary panel's report stated that appellant had an established diagnosis of a healed cervical and lumbar strain and no psychiatric diagnosis. As to whether appellant had a condition causally related to his federal employment, the physicians stated that appellant's cervical lumbar strain and acute anxiety were employment related. The physicians noted that all residuals would have ceased in approximately two months. The physicians opined that appellant was disabled for two to three weeks. The physicians noted that while appellant had no employment-related physical limitations, appellant would not be able to return to the employing establishment location where he last worked because of "severe personality conflicts" and not any psychiatric disability.

By letter dated November 8, 1984, the Office advised appellant that his condition had been accepted for a conversion reaction.

By letter dated January 31, 1986, the Office sent the employing establishment a copy of Dr. Petrakis' report and requested that the employing establishment aid appellant in transferring to another employment establishment location. The letter stated that if appellant could not be placed at another location, the Office would place appellant on the automatic compensation rolls retroactive to 1983.

By letter dated April 25, 1986, the employing establishment informed the Office that appellant had been hired at a different employing establishment location effective April 26, 1986.

In a memorandum dated July 14, 1986, an Office claims examiner, in response to other memorandums concerning the case, stated that appellant's condition should have been accepted for an acute anxiety reaction instead of a conversion reaction because no physician stated that a conversion reaction condition was causally related to employment factors. The claims examiner noted that the consensus of medical opinion from the multi-disciplinary panel was that appellant had no employment-related limitations to returning to duty and that their reservations concerning appellant's return to the employing establishment location where he previously worked was on the basis of "severe personality conflicts" and not psychiatric disability. The claims examiner recommended acceptance of the claim for cervical and lumbar strain, and anxiety with hyperventilation, with compensation to be paid through November 1, 1983 the last date for which there was any medical evidence of employment-related disability. The claims examiner noted that Dr. Hjortsvang's reports recommending appellant's transfer did not provide a diagnosis or an opinion on causal relationship. The claims examiner also noted that compensation was not payable "simply to prevent reinjury in the future."

By compensation order dated November 14, 1986, the Office rejected appellant's claim for disability beyond November 1, 1983 on the ground that the medical evidence indicated that there was no employment-related disability beyond that date. The decision stated that appellant's claim had been accepted for a lumbar and cervical strain and acute anxiety reaction with hyperventilation. An accompanying memorandum noted that suggestions that appellant be transferred to another location were "purely prophylactic" and not based on any employment-related disability.

By letter dated December 4, 1986 appellant, through his attorney, requested a hearing.

Before the hearing, appellant submitted an April 9, 1986 report from Dr. Hjortsvang that was originally drafted to address appellant's fitness to return to duty. Dr. Hjortsvang stated that it was his impression that appellant was "accused of things of which you were not guilty" and that appellant "developed a psychological fear or phobia." Dr. Hjortsvang referred to appellant's condition as "[b]asically . . . a situational reaction with marked anxiety and physical reactions" that caused the faint and fall. Dr. Hjortsvang stated that his conclusions were similar to those in his earlier reports and stated that appellant was "fit to return work" at the employing establishment. Because of appellant's "past reaction," Dr. Hjortsvang "strongly recommended against" appellant's return to the employing establishment location where he previously worked.

A hearing was held on December 7, 1987. Appellant's representative noted that appellant did not allege any continuing physical disability after November 2, 1983. At the hearing appellant submitted an undated transcript of Dr. Hjortsvang's testimony at an EEO hearing pertaining to appellant's situation. In the transcript, Dr. Hjortsvang stated that following his treatment of appellant in August 1983, he did not recommend any further treatment and that he had no other contact with appellant until 1986 when appellant contacted him for a letter to help appellant get a transfer. Commenting on a transfer within the employing establishment, Dr. Hjortsvang stated that it "seemed to be the most suitable situation, from what I could gather, from everything that I could see." Describing appellant's fear of returning to work at the employing establishment location where he worked on July 2, 1983, Dr. Hjortsvang stated: ". . . I think he had a psychological fear or apprehension. Phobia might be a little strong." Dr. Hjortsvang's testimony did not address whether appellant had any ongoing psychiatric disability attributable to the July 2, 1983 employment incident.

By decision dated and finalized on February 29, 1988 the Office hearing representative affirmed the November 18, 1986 Office decision. The hearing representative stated that the multi-disciplinary medical panel concluded that appellant had no psychiatric condition that could have caused disability after November 1, 1983. The hearing representative noted that Dr. Hjortsvang's reports, while suggesting that appellant be transferred to a different location, indicated that appellant was fit for duty. The hearing representative stated that the recommendations by physicians that appellant transfer to a different location was not a basis on which compensation could be paid.

The Board finds that appellant had no continuing disability due to a July 2, 1983 employment injury subsequent to November 1, 1983, the effective date that the Office terminated his compensation benefits.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

In the present case, appellant conceded at the December 7, 1987 hearing that his physical disability had ceased by the time that the Office terminated compensation benefits for temporary total disability. However, appellant contended that disability due to an emotional condition continued after November 1, 1983, the effective date that the Office terminated his compensation benefits.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employees' employment. There are distinctions as to the type of situation giving rise to an emotional condition which is covered under the Federal Employees' Compensation Act. When the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Act. On the other hand, the disability is not covered when it results from such factors as an employee's fear of a reduction-in-force, or his frustration from not being permitted to work in a particular environment or to hold a particular position or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job or promotion do not constitute personal injury sustained in the performance of duty within the meaning of the Act.[2]

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[1] *Patsy L. Rubio*, 37 ECAB 179 (1985)

The Office initially accepted that the July 2, 1983 employment incident caused a conversion reaction. The Office later amended this to a lumbar and cervical strain and an acute anxiety reaction with hyperventilation. In his July 11, 1984 report, Dr. Petrakis stated in a thorough and well-rationalized report that appellant had no psychiatric disability that would prevent him from engaging in gainful employment. While the panel of physicians examining appellant advised against appellant's return to the same employing establishment location where the July 2, 1983 employment incident occurred, they stressed that this was because of "severe personality conflicts" and not because of any psychiatric disability. Dr. Petrakis' opinion was based on a normal examination and appellant's desire to return to work. Dr. Petrakis opined that appellant's desire not to return to a particular employing establishment location constituted an occupational problem and not any ongoing psychiatric difficulty. Dr. Petrakis opined that for someone in appellant's situation, his feelings toward the employing establishment were "essentially normal." Other physicians on the multi-disciplinary panel could find no psychiatric or other basis to support any disability that extended for more than two to three weeks.

Appellant's treating physician, Dr. Jensen, released appellant to return to work on November 1, 1983. Appellant's treating psychiatrist, Dr. Hjortsvang, as did Dr. Jensen, recommended that appellant could return to duty at another employing establishment location. Dr. Hjortsvang's August 26, 1983 report noted appellant's "chronic emotional distress." In his November 2, 1983 report, offered in support of appellant's request for a transfer, Dr. Hjortsvang stated that appellant had developed a psychological fear or phobia and that he was not "psychologically capable" of working at the location where the July 2, 1983 incident occurred. However, Dr. Hjortsvang did not provide a firm diagnosis of psychiatric disability and his subsequent undated EEO hearing transcript indicated that he recommended a transfer because it would provide the "most suitable situation" and also noted that appellant's condition probably did not rise to the level of a phobia but was more likely on the level of a fear or apprehension. Dr. Hjortsvang noted at the EEO hearing that he recommended no further psychiatric treatment of appellant following the August 1983 treatment sessions. Additionally, as noted above, appellant's frustration at not being able to work in a particular environment is not a basis on which compensation can be awarded. Dr. Hjortsvang's and Dr. Jensen's reports are not of greater or equal weight as those of Dr. Petrakis and the multi-disciplinary panel.

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[2] *Buck Green*, 37 ECAB 374 (1986); *Lillian Cutler*, 28 ECAB 125 (1976).

The Board finds that the weight of the medical evidence rests with Dr. Petrakis and the multi-disciplinary panel's final narrative summary. Consequently, the Office has met its burden of proof in establishing that appellant sustained no compensable disability subsequent to November 1, 1983.

The February 29, 1988 Office of Workers' Compensation Programs' decision is affirmed.

In the Matter of CHARLES D. HAWS *and* DEPARTMENT OF JUSTICE, U.S. MARSHAL SERVICE, Knoxville, Tenn.

Docket No. 87-1868; Submitted on the Record;
Issued September 29, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has any permanent impairment of the right lower extremity, due to a February 28, 1984 employment injury, entitling him to a schedule award.

On March 2, 1984 appellant, then a 34-year-old law enforcement officer, filed a claim for injury to his right knee which he sustained while chasing a felon. On March 27, 1984 appellant was examined by Dr. J. Bryan Smalley, an orthopedist. In a report dated April 10, 1984 Dr. Smalley indicated the proper history of injury and recommended surgery for a "probable medial meniscus tear, right knee."

The Office accepted appellant's claim for probable medial meniscus tear right knee and authorized the requested surgery.

On May 8, 1984 Dr. Smalley performed a "partial right medial and lateral meniscectomy and patellar shaving" on appellant's right knee. In a hospital discharge summary Dr. Smalley indicated that appellant did well postoperatively and was discharged on May 10, 1984 "ambulatory on crutches with weight bearing to tolerance on the right." The doctor noted that in addition to a "torn medial and lateral meniscus," appellant's arthroscopy revealed "old tear anterior cruciate ligament right knee" and "osteoarthritis right knee."

Appellant submitted clinic notes from Dr. Smalley who reported that appellant continued to improve postoperatively. On July 9, 1984 Dr. Smalley noted:

> "[Appellant] doing quite well and can swim and run without difficulty. On examination he has no joint effusion, the collateral ligaments are stable. He has 1-2 plus positive Lachman test. The pivot shift and axial compression test are negative. He has full range of motion of his knee. I released him to full duty on July 10, 1984."

Appellant subsequently indicated that he wished to be considered for a schedule award. In support thereof he submitted two additional reports from Dr. Smalley. In an October 31, 1986 report Dr. Smalley stated:

> "According to table 38 [of the A.M.A. *Guides*], [appellant] has a 25 percent impairment of the lower extremity for medial and lateral meniscectomy and a 20 percent for anterior cruciate ligament loss. Using the combined table, he has a 40 percent physical impairment of the lower extremity."

In a February 18, 1987 CA-20 form report, Dr. Smalley opined that appellant had 40 percent permanent physical impairment of the lower extremity. He stated that a June 2, 1986 examination of appellant showed that he had full range of motion of his knee, that the collateral ligaments were stable and that appellant had "2+ positive anterior Drawer and 2+ positive Lachman Test." The doctor noted that appellant had no joint line tenderness.

On April 2, 1987 an Office medical adviser reviewed the medical evidence. He noted that Dr. Smalley failed to provide current data on appellant's retention of flexion, pain and weakness. The medical adviser further noted Dr. Smalley's operative report indicated a partial meniscectomy and stated that the A.M.A. *Guides* give ratings only for total meniscectomy. He recommended obtaining a supplemental report from Dr. Smalley.

In a letter to Dr. Smalley dated April 22, 1987 the Office noted that although Dr. Smalley had assigned appellant a 25 percent impairment rating due to the February 28, 1984 meniscus injury, he had not attributed any pain, weakness or atrophy to the injury and had indicated appellant's range of motion was such that he could run and swim without difficulty. The Office further noted that appellant had partial meniscectomy and that the A.M.A. *Guides* impairment ratings are based on total meniscectomy with loss of shock absorption. The Office requested Dr. Smalley to opine, in light of these factors, whether or not appellant has any impairment due to the February 28, 1984 injury and if his opinion was that appellant does have such impairment, to detail the basis for his opinion.

In response to the Office request for an explanation of his opinion of the 25 percent impairment for partial meniscectomy, Dr. Smalley submitted a May 4, 1987 report. He opined that "a sufficient amount of meniscus was removed both medially and laterally [from appellant's right knee] to cause permanent changes and a 25 percent permanent partial physical impairment rating."

On April 15, 1987 a second medical adviser reviewed the medical evidence. He noted that appellant had full extension, full flexion and that Dr. Smalley had not indicated disability "due to anterior cruciate laxity." He further noted that the A.M.A. *Guides* provided a disability rating for meniscectomy "with loss of shock absorption" and that appellant had "an arthroscopic partial meniscectomy without loss of shock absorption." He concluded that appellant had no permanent impairment in his lower right extremity.

By compensation order dated July 31, 1987 the Office rejected appellant's claim on the ground that the weight of the medical evidence established that appellant has no injury-related permanent impairment of the right leg.

The Board finds that the case is not in posture for decision.

The American Medical Association's *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office and approved by the Board as an appropriate standard for evaluating schedule losses.[1]

In this case, appellant submitted reports from Dr. Smalley who referred to the A.M.A. *Guides* and stated that "according to Table 38, [appellant] has a 25 percent impairment of the lower extremity for medial and lateral meniscectomy and a 20 percent impairment for anterior cruciate ligament loss." In response to an Office request that he address whether appellant sustained loss of shock absorption in his right knee, Dr. Smalley opined: "a sufficient amount of meniscus was removed both medially and laterally, to cause permanent changes and a 25 percent permanent physical impairment rating."

An Office medical adviser subsequently reviewed Dr. Smalley's reports and stated that since appellant had only a partial meniscectomy and since Dr. Smalley had not indicated any loss of shock absorption, appellant had no ratable permanent impairment according to the A.M.A. *Guides*. The Board finds that the medical adviser incorrectly concluded that Table 38, page 39, of the *Guides* provides permanent impairment values only for total meniscectomy. Table 38 does not specify that the meniscectomy must be a total meniscectomy. In this connection, the first Office medical adviser, Dr. Abernathy, stated that the *Guides* give ratings "for total (complete) meniscectomy with loss of shock absorption, *not* partial meniscectomies." Dr. Abernathy did not provide any rationale for this opinion.

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[1] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (2nd ed. 1984). *See Anne E. Hughes*, 27 ECAB 106 (1975) and cases cited therein.

A second Office medical adviser reviewed the case on April 15, 1987. He noted that appellant "had arthroscopic partial meniscectomy *without loss of shock absorption*." The second Office medical adviser assigned a zero percent impairment for the right lower extremity without providing any rationale as to why he was of the opinion that Dr. Smalley's opinion that "a sufficient amount of meniscus was removed both medially and laterally, to cause permanent changes and a 25 percent permanent physical impairment rating" did not satisfy the criteria under Table 38, page 39, of the *Guides* with respect to loss of shock absorption.

With respect to the 20 percent permanent impairment Dr. Smalley assigned for anterior cruciate ligament loss using Table 38, page 39, of the *Guides*, the first Office medical adviser, Dr. Abernathy, reviewed Dr. Smalley's findings and stated: "I am unable to equate the above findings with Dr. Smalley's estimate of PPI of 40 percent on 10-31-86." He further noted that more information was needed on the status of the right knee as well as how the 20 percent value was arrived at under the *Guides*.

The second Office medical adviser stated that "claimant has no disability due to anterior cruciate laxity (noted then by Dr. Smalley to be '1-2 plus positive Lachman Test.') There was no report of a positive anterior drawer sign." No additional reason or rationale for the foregoing conclusion of no disability due to anterior cruciate laxity was given aside from the statements that Dr. Smalley noted that appellant "can swim and run without difficulty" and "released him to full duty then."

The Board finds that neither of the Office medical advisers provided sufficient reason or rationale as to why the medical reports of Dr. Smalley did not satisfy the criteria for 20 percent anterior cruciate ligament loss under Table 38 of the *Guides*.

Proceedings under the Federal Employees' Compensation Act are not adversary in nature nor is the Office a disinterested arbiter.

While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[2]

On remand the Office should refer appellant, if necessary, along with the case record to Dr. Smalley to ascertain whether there was loss of shock absorption due to the right knee medial meniscectomy and the extent of anterior cruciate ligament loss. Following receipt of this report, the Office should further develop the record as it deems necessary and issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated July 31, 1987 is hereby set aside and the case is remanded to the Office for further development in accordance with this decision.[3]

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[2] *Robert F. Hart*, 36 ECAB 186 (1984).

[3] The Board notes that oral argument was scheduled for July 7, 1988, that appellant did not appear at the scheduled time, and that appellant's representative advised by telephone on that date that appellant withdrew his request for oral argument and requested, instead, that the Board proceed with its decision on the record as submitted.

In the Matter of RALPH W. BAKER *and* VETERANS ADMINISTRATION, FORT HARRISON MEDICAL CENTER, Fort Harrison, Mont.

Docket No. 88-407; Submitted on the Record;
Issued September 30, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity after September 27, 1987.

On February 6, 1981 appellant, then a 34-year-old laborer, filed a claim for a twisted back sustained on January 30, 1981 by working with a jackhammer on a ladder. On February 2, 1981 appellant was examined by Dr. John H. Mitschke, a general practitioner for the employing establishment, who listed a history that appellant fell off a ladder, and who diagnosed a lumbar strain.

Appellant stopped work on February 5, 1981. He received continuation of pay from that date until March 20, 1981, after which the Office began paying him compensation for temporary total disability.

On April 29, 1982 surgery was performed on appellant's low back by Dr. John H. Avery, a Board-certified orthopedic surgeon, and Dr. George W. Schemm, a Board-certified neurosurgeon. Dr. Avery described the surgery as a lumbar laminectomy with the removal of the posterior element of L5 and bilateral lateral arthrodesis at L5-S1. The Office paid for this surgery and for subsequent surgeries consisting of spinal fusion from L4 to the sacrum performed on April 19, 1984 and exploration of the spine with repair of the pseudoarthrosis of L4-5 and L5-S1 performed on November 29, 1984 both by Dr. James E. Scott, a Board-certified orthopedic surgeon.

On June 20, 1986 the Office referred appellant, the case record and a statement of accepted facts to Dr. Charles E. Buehler, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion on the questions of whether appellant continued to suffer residuals of his employment injury, whether he was still disabled by such residuals, and whether the surgeries were necessary for the treatment of the January 30, 1981 employment injury. This conflict was between Dr. Scott, who concluded that appellant's April 1984 surgery was necessary as a result of residuals of appellant's January 30, 1981 injury and that appellant continued to be partially disabled, and an Office medical adviser who opined that appellant sustained only a lumbar strain on January 30, 1981 which resulted in temporary disability for a period of three to six weeks.

In an August 19, 1986 report Dr. Buehler stated that appellant did continue to suffer residuals of the January 30, 1981 injury, that in retrospect he was not certain whether any of the surgical procedures were necessary, but that the original surgery was justifiable given his symptoms and the workup done at the time. Dr. Buehler concluded that the injury was not the cause of appellant's spondylolysis or spondylolisthesis, but that it appeared that the aggravation of this injury precipitated the necessity for the laminectomy and fusion. Dr. Buehler also completed an Office work tolerance limitations form on August 19, 1986, indicating that appellant could lift 10 to 20 pounds, walk and stand intermittently for eight hours per day, and sit intermittently for four hours per day.

In a January 22, 1987 letter appellant indicated that he had begun a road grading business, and stated that he had 15 or more years of experience as an equipment operator and mechanic, and that he was an experienced small business operator, having operated excavation, refrigeration and air conditioning businesses in the past.

On June 30, 1987 the Office referred appellant to Dr. Buehler for an examination and for another evaluation of his work tolerance limitations. In a July 22, 1987 report Dr. Buehler stated that appellant's condition was about the same as when he was examined about one year previously, that his work tolerance limitations remained the same, that he believed appellant could handle a grading and excavating business if he worked within his limits, and stated: "The real important factor here I think is the ability to not have to do one job for any extended period of time, but the intermittent applications of sitting, walking or standing as he feels is dictated by his back condition."

In April 1987 the Office had selected the position of small business manager/contractor (construction) from the Department of Labor's *Dictionary of Occupational Titles* [1] as representing appellant's wage-earning capacity. The physical requirements of this position were lifting up to 20 pounds, walking, standing, and pushing and pulling on arm or leg controls. In August 1987 an Office medical adviser reviewed the requirements of this position and Dr. Buehler's work tolerance limitations and stated that the requirements of the position were within appellant's work tolerance limitations. A rehabilitation specialist with a private vocational rehabilitation service confirmed that the position of small business manager/contractor was performed in sufficient numbers within appellant's commuting area to be considered reasonably available. This rehabilitation specialist also ascertained the weekly wages of this position. Vocational preparation required was described as two to four years.

On August 17, 1987 the Office issued a notice of proposed termination of compensation, in which it advised appellant that the medical and factual evidence established that he was partially disabled and had the capacity to earn greater wages as a small business manager/contractor (construction) than the current wage rate of the position he held when injured. The Office further advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence or argument within 30 days.

By a compensation order dated September 23, 1987 the Office terminated appellant's compensation effective September 27, 1987 on the basis that he had no loss of wage-earning capacity. The Office found that appellant was capable of performing and qualified for the position of small business manager/contractor (construction), that this position fairly represented his wage-earning capacity, and that the rate of pay for this position exceeded the current rate of the position he held when injured.

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[1] *Dictionary of Occupational Titles* No. 182.167-010.

The Board finds that the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity after September 27, 1987.

Once the Office determines that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation.[2] After the Office has determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] As used in the Federal Employees' Compensation Act the term disability means incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury; that is, a physical impairment resulting in a loss of wage-earning capacity.[4]

The Office met its burden by establishing that appellant had no loss of wage-earning capacity and therefore was not disabled within the meaning of the Act after September 27, 1987. The physical requirements of the position selected by the Office, small business manager/contractor (construction), do not exceed the work tolerance limitations set forth by Dr. Buehler on August 19, 1986 and July 22, 1987. There is no medical evidence that appellant is unable to perform the physical requirements of the selected position. The evidence establishes that appellant has the two to four years of experience required for the position.

Through contact with a private rehabilitation specialist the Office ascertained that the selected position was reasonably available in appellant's commuting area, and also ascertained the wages of the position. It then compared these wages to the current pay rate of the position appellant held when injured. As the wages of the selected position were greater, the Office properly found that appellant has no loss of wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated September 23, 1987 is affirmed.

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[2] *Samuel J. Russo*, 28 ECAB 43 (1976).

[3] *David Lee Dawley*, 30 ECAB 530 (1979).

[4] *Claude Pilgreen*, 30 ECAB 75 (1978).

In the Matter of GERALD R. BROWN *and* U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, Pa.

Docket No. 88-1196; Submitted on the Record;
Issued September 30, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of $429.98 occurred; and (2) if so, whether the Office properly found that appellant was not "without fault" with respect to creating the overpayment and therefore the overpayment was not subject to waiver of recovery.

On May 4, 1985 appellant filed a claim for traumatic injury sustained on that date when he injured his upper and lower back while pushing mail. Appellant stopped work on May 5, 1985 and has not returned.

On June 12, 1985 the Office of Workers' Compensation Programs accepted appellant's claim for exacerbation of lumbar disc disease. Appellant received continuation of pay for the period May 4, 1985 to June 19, 1985, thereafter receiving compensation for temporary total disability.

On June 19, 1985 appellant submitted a form CA-7 claim for compensation on account of traumatic injury, claiming compensation as a result of wage loss commencing June 19, 1985. On the reverse of the claim form appellant's supervisor failed to indicate that appellant had deductions taken from his pay check due to an optional life insurance policy.

By form CA-1049 dated September 5, 1985 the Office informed appellant that he would be paid compensation, until further notice, under the conditions set forth in the letter. The form noted that if appellant had basic life insurance (FEGLI) coverage it would be continued at no cost to him. The form indicated the gross amount of pay, the amount of deductions, if any, for health benefits and optional life insurance and the net amount of appellant's payment. The form listed no deductions from appellant's payment for optional life insurance for the first payment covering the period from July 5, 1985 to August 31, 1985, nor for any subsequent regular payments.

By routing slip addressed to the Office dated July 9, 1987 the employing establishment noted that when it filled out the form CA-7 on June 19, 1985 it had failed to complete the block for optional insurance even though appellant had previous deductions from his pay-check due to optional life insurance. Effective August 29, 1987 the Office began deducting from appellant's compensation checks premiums for optional life insurance benefits.

By letter dated March 7, 1988 the Office informed appellant of a preliminary determination that he had received an overpayment of compensation in the amount of $429.98. The letter explained that the overpayment had occurred because optional life insurance deductions were never made from his compensation benefits for the period June 19, 1985 to August 29, 1987. The Office further informed appellant that he was at fault in the creation of the overpayment since a form CA-1049 was sent to him on September 5, 1985 which showed that optional life insurance premiums were not being deducted.

By letter dated March 13, 1988 appellant contended that he was not at fault in the creation of the overpayment. Appellant noted that it was the employing establishment who failed to correctly complete the form CA-7 that resulted in the overpayment due to the failure to deduct optional life insurance premiums.

Appellant requested a reevaluation of the Office's preliminary determination that he was at fault in the creation of the overpayment, and waiver of the overpayment, if eligible.

By letter decision dated April 17, 1988 the Office found that an overpayment of compensation had occurred in appellant's case in the amount of $429.98 because optional insurance deductions were never made from appellant's compensation benefits for the period from June 19, 1985 to August 29, 1987. The Office determined that appellant was at fault in the creation of the overpayment stating:

> "A review of your file shows that form CA-1049 was sent to you on 9/5/85. It showed that optional insurance premiums were not being deducted. It was your responsibility to contact your agency or this Office with regard to why deductions were not being made."

The Office requested that appellant forward a check in the amount of $429.98 to cover the overpayment of compensation.

By letter dated April 29, 1988 appellant requested an appeal to the Employees' Compensation Appeals Board. Appellant alleged:

> "When I had form CA-7 filled out on 6/19/85 I was told by my agency that optional insurance was not covered while on com-

> pensation. So therefore, when I received CA-1049 on 9/5/85 almost three months later, based on what I was told I thought nothing of it. . . . Because of the errors and misinformation about my optional insurance and health benefits, I feel that I am not at fault and should not be held responsible."

The Board finds that the Office properly determined that an overpayment of compensation in the amount of $429.98 occurred.

An employee who is already enrolled in an optional life insurance program is entitled to continued coverage while receiving compensation under the Federal Employees' Compensation Act. Premiums are withheld from the employee's compensation payments.[1] FECA Bulletin No. 85-31 [2] provides that when an underwithholding of optional life insurance premiums is discovered, the entire amount is deemed an overpayment of compensation and subject to the waiver provisions of 5 U.S.C. section 8129, as well as to other statutes and regulations relative to overpayments and collections of debts.

In the instant case, the employing establishment failed to indicate on appellant's form CA-7 that he was enrolled in an optional life insurance program, resulting in the failure to deduct optional life insurance premiums, thereby creating pursuant to FECA Bulletin No. 85-31 an overpayment of compensation in the amount of $429.98.

The Board finds that appellant was "without fault" in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act [3] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." [4] No waiver of overpayment is possible if the claimant is not without fault in helping to create the overpayment.

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[1] Federal (FECA) Procedure Manual, Health Benefits and Optional Life Insurance, Part 5—Benefit Payments, Chapter 5-400, FECA Tr. No. 86-2 (October 1985).

[2] Issued June 4, 1985.

[3] 5 U.S.C. section 8101 *et seq.*

[4] 5 U.S.C. section 8129(b).

In deciding whether an individual is "without fault" what constitutes "fault" must first be determined. Section 10.320(b) of Title 20 of the Code of Federal Regulations states in relevant part:

> "An individual is with fault in the creation of an overpayment who:
>
> > '(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
> >
> > '(2) Failed to furnish information which the individual knew or should have known to be material; or
> >
> > '(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.' "[5]

In the instant case, the Office, in finding appellant at fault in creating the overpayment, applied the third standard—acceptance of a payment which the individual knew or should have been expected to know was incorrect.

The Board finds that the facts of this case do not establish that appellant knew or should have been expected to know that he had accepted payments that were incorrect.

The Office accepted appellant's claim and paid him compensation for temporary total disability. By form letter CA-1049 dated September 5, 1985 the Office informed appellant of the gross amount of compensation he would be entitled to every four weeks. The form indicated that no deductions were being made for optional insurance. The Office based its finding of fault in this case on its determination that appellant knew or should have known from the face of the CA-1049 that deductions from his compensation payments should have been made for optional insurance.

The Board finds that the form letter CA-1049 dated September 5, 1985 indicates only that there was a place for deductions for optional insurance. The form on its face is not sufficient to put appellant on notice that such deductions should have been made in his case.[6] The Board notes that there is nothing in the record which should have alerted appellant that he was responsible for continuing payments on optional insurance or that such payments should be deducted from his compensation. The Board further notes that the

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[5] 20 C.F.R. section 10.320(b).

[6] *See Antonio Mestres*, Docket No. 88-184 (issued August 26, 1988).

Office informed appellant in its September 5, 1985 CA-1049 that his basic life insurance coverage would continue at no cost to him.

The Board finds that under the circumstances of this case the Office has not presented any evidence which establishes that appellant accepted a payment which he knew or should have been expected to know was incorrect. Therefore, appellant is "without fault" in the creation of the overpayment in this case. The case will be remanded to the Office for consideration of waiver.

The decision of the Office of Workers' Compensation Programs dated April 17, 1988 is hereby reversed as to the finding of fault and remanded to the Office for a determination on the issue of waiver.

In the Matter of WARREN GUIDRY *and* DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, PORTLAND DISTRICT, Portland, Oreg.

Docket No. 88-679; Submitted on the Record;
Issued September 30, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has more than a 38 percent binaural hearing loss.

On January 26, 1975, appellant, then a 46-year-old marine oiler, filed a claim for a hearing loss due to working near noisy engines aboard dredges.

The employing establishment indicated that appellant was aboard the dredges 24 hours a day for 10 days with the next four days off in any two-week period. It estimated that he spent three hours a day in the machine shop, three hours a day in the engine room, one hour a day in the dredge pump room and one hour a day in the steering room. The employing establishment reported that noise surveys showed that noise levels in the machine shop ranged from 81 decibels to 96 decibels; noise levels in the engine room ranged from 109 to 115 decibels; noise levels in the dredge pump room ranged from 81 to 91 decibels; and noise levels in the steering room were measured at 90 decibels.

The Office of Workers' Compensation Programs referred appellant to Dr. Paul B. Myers, a Board-certified otolaryngologist, for an examination. In a December 3, 1975 report Dr. Myers stated that audiometry showed essentially normal hearing in the right ear but a profound high frequency sensorineural hearing loss in the left ear. Dr. Myers indicated that he was unable to explain the marked difference between the hearing acuity in the ears given that appellant wore ear protectors and that both ears were exposed. He commented that if the left ear loss was the direct result of working in a traumatic noise environment, then the right ear would have been expected to have sustained some loss as well. Dr. Myers stated that under these circumstances he could not relate appellant's profound hearing loss in the left ear with normal acuity in the right ear to acoustic trauma from his exposure in the engine room or other areas aboard the dredge.

In a February 23, 1976 decision, the Office found that the evidence of record failed to show that appellant's hearing loss was related to his employment.

Appellant submitted a July 19, 1976 audiogram and a July 22, 1976 report from Dr. Max Simons, an otolaryngologist. Dr. Simons stated:

> "Calculations followed your instructions with findings at:
>
> | | 1,000 Hz | 2,000 Hz | 3,000 Hz frequencies |
> |---|---|---|---|
> | Right ear: | 50 dB | 40 dB | 40 dB |
> | Left ear: | 55 dB | 65 dB | 100 dB |
>
> Decibel sum hearing levels: Right ear: 130 dB Left ear: 220 dB
>
> Estimated hearing level for speech: 43.3 dB 73.3 dB
>
> Monaural hearing impairment: 27.5% 72.5%
>
> Binaural hearing impairment: 35%
>
> Binaural hearing impairment as related to whole man: 12%
>
> "The formula above follows the A.M.A. outline.
>
> "*IMPRESSION*: Mr. Warren Guidry has a neurosurgical hearing defect predominantly in the left ear. This has been verified by examination and audiometry.
>
> "The past history is clear of factors that could cause or contribute to such loss.
>
> "He received medical hearing and ear clearance when separated from the military service. This indicates a normal hearing before reentering the civilian industrial environment.

> "Considering the above in relation to the presently described working conditions, we conclude that it is this exposure that probably brought about the permanent partial disability."
>
> * * *
>
> "The hearing loss is probably due to the traumatic exposure in the engine rooms aboard the dredges."

In a December 29, 1976 report, Dr. C. W. Kuhn, a Board-certified otolaryngologist, stated that appellant had a hearing loss averaging 98 Hz (Hertz) in the left ear and 88 Hz in the right. He noted that the bone conduction tests were below 65 Hz in all tones.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Alexander J. Schleuning, II, a Board-certified otolaryngologist, to resolve the conflict in the medical evidence between Dr. Myers and Dr. Simons. Dr. Schleuning referred appellant to Carolyn B. Talbott, an audiologist. The audiologist reported that pure air conduction scores for the right ear were within normal limits except at 6,000 and 8,000 c.p.s. She indicated that scores for the left ear showed a sharply falling configuration in the high frequencies. She stated that test retest reliability was poor with responses to higher frequency tones presented in the left ear characterized by many false positive responses.

In a January 26, 1977 report, Dr. Schleuning stated that two audiograms showed a severe high tone hearing loss in the left ear but relatively normal hearing in the right ear. He indicated that it was difficult to give a clear answer on whether appellant's hearing loss was caused or aggravated by his employment. He commented that appellant's employment environment suggested that he was exposed to noise levels which could be responsible for inducing a high tone loss. He pointed out, however, that ordinarily in a closed space the hearing loss is bilateral. He noted that appellant claimed that he had never had satisfactory hearing protection from the earplugs in his left ear. The doctor stated that if this were the case it would be conceivable for appellant to have a unilateral hearing loss.

In a June 17, 1977 decision, the Office found that appellant had not established that his disability was causally related to his employment.

Appellant submitted a November 17, 1976 report from Dr. Alan Keaton, an otolaryngologist. Dr. Keaton indicated that appellant showed decreased hearing. He concluded on the basis of appellant's noise exposure at work and his previous normal hearing tests prior to work at the employing establishment that appellant's job in the engine room contributed greatly to his hearing loss.

Appellant submitted a November 7, 1979 report from Dr. Gregory K. Chan, a Board-certified otolaryngologist, who stated that audiograms showed a profound sensorineural hearing impairment bilaterally. He calculated that appellant had a 100 percent loss of hearing in the left ear and a 97.5 percent hearing loss in the right ear. He stated that he disagreed with the opinion that noise-induced hearing loss had to be causing bilateral identical hearing problems. He diagnosed profound bilateral sensorineural hearing impairment most probably related to prolonged noise exposure.

In a December 21, 1979 letter, the Office indicated that Dr. Chan's report was of little value in establishing that appellant's hearing loss was caused by noise trauma. It pointed out the marked inconsistencies in audiogram readings performed by various physicians. The Office suggested an additional report from Dr. Chan on matters which would affect the reliability of Dr. Chan's result. In a February 8, 1980 letter, Dr. Chan noted the inconsistencies but pointed out that other audiograms had shown bilateral sensorineural hearing loss. He recommended that more specific hearing tests be taken.

In a May 1, 1980 decision the Office denied modification of its prior decision.

Appellant requested a hearing before an Office hearing representative. After the October 27, 1980 hearing, the Office hearing representative, in a January 13, 1981 decision, found that the weight of the medical evidence showed that appellant's hearing loss could not be attributable to noise exposure.

Appellant requested reconsideration and appealed to the Board. In a May 29, 1981 order, the Board dismissed the appeal on the ground that appellant had previously requested reconsideration.[1]

In an August 10, 1981 decision the Office denied appellant's request for reconsideration on the ground that the evidence submitted by appellant was cumulative and repetitious and therefore insufficient to warrant review of the prior decision.

Appellant again appealed to the Board. In a January 21, 1982 order the Board noted that there was a conflict in the medical opinion evidence on whether appellant could have sustained a monaural hearing loss as a result of being exposed to noise at work as well as conflicting reports on whether appellant had a monaural or bilateral hearing loss. The Board therefore set aside the Office's

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[1] Docket No. 81-1052 (Order Dismissing Appeal issued May 29, 1981).

January 13, 1981 decision and remanded the case for referral of appellant to a Board-certified specialist for complete otologic testing and evaluation.[2]

The Office referred appellant to Dr. George E. Chamberlain, a Board-certified otolaryngologist. In a May 25, 1982 report Dr. Chamberlain indicated that his audiologist was not satisfied with pure tone audiometry because of the inconsistencies of responses. Dr. Chamberlain reported that the speech audiometry was not reliable because of lack of consistency between speech and pure tone reception threshold. Dr. Chamberlain stated because of these tests it was not possible to state whether appellant had a bilateral or unilateral hearing loss. He noted that a review of the records showed that at one point appellant had a definite unilateral loss followed shortly by a severe bilateral loss in the absence of any particular change in noise levels which suggested a functional component. He recommended brain stem audiometry in an effort to rule out functional disorder.

In a September 16, 1982 memorandum an Office medical adviser stated that the last tests showed appellant had binaural hearing loss but not definitely as a result of his employment. He indicated that appellant had a functional component of his hearing loss. He commented that he did not believe that appellant's hearing loss was related to his job. He pointed out that the right ear was only slightly impaired in some audiograms which did not agree with noise damage. He recommended Stenger's testing and electrodermal tests.

In a September 3, 1982 report Dr. Chamberlain stated that appellant had a long history of noise exposure of sufficient loudness to cause some nerve damage to his ears. He reviewed the medical records noting that hearing losses ranged from a relatively mild high tone loss in December 1977 to a 80 to 100 decibel level in 1979. He commented that with such inconsistent results, it was impossible to arrive at a definite figure. He indicated that the varying responses suggested a functional loss, either hysterical or deliberate.

The Office requested further clarification from Dr. Chamberlain. In a January 3, 1983 response, Dr. Chamberlain recommended that appellant be referred to the Portland Center for Hearing and Speech where he could be tested for functional hearing loss.

The Office referred appellant, together with a statement of accepted facts and the case record to Dr. Richard Hodgson, a Board-certified otolaryngologist, for an examination.

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[2] Docket No. 82-360 (Order Remanding Case issued January 21, 1982)

Appellant was seen by Dr. Richard P. Panian, a Board-certified otolaryngologist and associate of Dr. Hodgson. In a May 15, 1985 report, Ms. Talbott, the audiologist who had previously tested appellant stated:

> "Pure tone audiometric threshold scores for the right ear were obtained in the moderately severe hearing loss range from 250-600 Hz. Scores for the left ear were in the moderately severe hearing loss range only for the lower frequencies, falling to the profound hearing loss range, beyond the limits of the equipment for the high frequencies. The responses recorded were the best results obtained using either steady or pulsed tone presentations. No responses were obtained to bone conduction (right mastoid placement) at levels which should either have elicited a response to bone conducted tone or to vibration.
>
> "Speech reception threshold scores were initially obtained at 82dB right and 80dB left. These scores were significantly poorer than what might be expected from the pure tone findings, especially at the right ear. These scores were repeated later in the test session in an attempt to bring them into closer agreement, but the results were even poorer (90dB & 92dB). On the other hand, at a level of 100dB speech discrimination scores were obtained of 92% right and 96% left, a finding hard to believe with such poor pure tone results.
>
> "Tympanometry yielded results consistent with normal tympanic compliance for each ear. Stapedius reflex thresholds are not symmetrical, suggesting poorer hearing at the left than at the right. Reflex thresholds are reduced and, in light of the pure tone findings, may suggest better pure tone results than were obtained."
>
> * * *
>
> "In summary, there is neither test retest reliability nor intertest reliability in this man's test results. His lack of needing visual cues and his treatment of the hearing aid are not behaviors consistent with the behavior of a severely hearing impaired person. The most definite statement that can be made is that scores for the left ear may suggest poorer hearing ability at the left than at the right."

In a May 30, 1985 report Dr. Panian stated:

> "I will attempt to answer the questions which you relate to in the letter. Your first question asks if his hearing loss is secondary to employment. I feel that a certain amount of his hearing loss can certainly be attributed to a considerable noise exposure, the degree of which is uncertain. Going back to 1976, he has severe hearing loss in both ears, more marked in the left than the right, and this has changed relatively little during the last ten years. Stenger's tests cannot be carried out with bilateral hearing loss, as this patient experiences. I feel the patient does have some element of a functional component in his hearing loss, this again is very difficult to measure.
>
> "With his most recent audiogram, performed by my audiologist, April 15, 1985, it is somewhat inconsistent in that he has a severe hearing loss involved in the left ear, yet his discrimination is much better in that ear than the right ear. He has unusually good discrimination for such a severe hearing loss involving both ears. It is difficult to evaluate his hearing loss over the years, in that he had fairly normal hearing in the right ear in 1975, as tested by Dr. Paul Myers. At that time he had a severe loss in the high frequencies only in the left ear. Difficult to relate that his hearing loss involved in his right ear would be entirely secondary to continued noise exposure. Since he has faithfully worn his ear protectors during this time, it is again difficult to determine why his hearing loss has still deteriorated. All the testing has been carried out to rule out any intracranial pathology, that would cause the hearing loss, and this has all been negative.
>
> "In total, I do not feel that I can relate the profound hearing loss in both ears, especially more marked in the left than the right, to acoustic trauma from his exposure in the engine room over a period of time."

In a September 10, 1985 memorandum an Office audiology consultant stated that Dr. Panian's and Ms. Talbott's reports indicated that appellant was consciously or unconsciously elevating his reported hearing levels above his actual levels. He pointed out that appellant's test results showed poor reliability with poor agreement between tests of different types and large variability among past tests. He commented that there was a high probability that appellant did not accurately report what he heard. He concluded that the Office most likely did not have valid hearing test results that could be used to determine appellant's degree of hearing impairment, if one was present.

In a November 24, 1986 letter, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Alfred J. Schroeder, a Board-certified otolaryngologist. The Office instructed appellant to call Dr. Schroeder's office to arrange for an examination. In a January 5, 1987 letter, the Office asked appellant whether he had been examined by Dr. Schroeder and, if not, what his reasons were for not making an appointment. In an April 15, 1987 letter, appellant's attorney stated that, in his opinion, there was no conflict among the medical examiners. He asserted that appellant had been more than cooperative in attending medical examinations. He contended that there was no additional testing that appellant could be subjected to.

In a June 16, 1987 decision, the Office suspended appellant's right to compensation on the ground that he had refused to undergo an examination as instructed by the Office.

Appellant requested a hearing before an Office hearing representative. In an August 31, 1987 decision the Director vacated the Office's June 16, 1987 decision. An Office hearing representative indicated that appellant's referral to Dr. Schroeder was prompted by the Office's invalidation of Ms. Talbott's finding for Dr. Panian because she had been previously associated with the case with Dr. Schleuning. The hearing representative stated, however, that Ms. Talbott was not a physician to whom appellant had been referred to resolve a conflict in the medical evidence. He pointed out that she was a technician who offered an opinion on the accuracy and reliability of the testing performed but could not offer a medical opinion concerning the relevant issue of employment-related hearing loss. He stated the fact that Ms. Talbott had previously conducted audiometric examination on appellant neither invalidated testing performed on May 15, 1985 nor diminished the probative value of Dr. Panian's report based in part on such testing. The hearing representative stated that this finding concerning Dr. Panian's report obviated the need for further evaluation. He therefore reversed the Office's June 16, 1987 decision and remanded the case for a *de novo* decision on whether appellant sustained a hearing loss causally related to conditions of his employment.

In a November 6, 1987 memorandum an Office audiology consultant stated that Dr. Panian's hearing tests results were not valid. He pointed out that until the Office had valid hearing test results, it could not determine the diagnosis nor the amount of compensation if the hearing loss was found to be compensable. He recommended further audiology studies to determine the degree of hearing loss.

In a November 24, 1987 letter, appellant's attorney contended that since 1976 the Office had evidence that appellant sustained a hearing los as a result of a traumatic exposure at work. He stated that the Office could use Dr. Simon's report in calculating the extent of appellant's hearing loss.

In a December 2, 1987 memorandum, an Office assistant regional administrator reviewed the history of appellant's case, including the recommendation for a new examination. The administrator directed the cancellation of a new examination and agreed to the use of Dr. Simons' July 22, 1976 report for the purpose of calculating the extent of appellant's hearing loss. He noted that Dr. Simons' report and audiogram were selected after a thorough review of the case record. He stated that appellant's claim was accepted for binaural hearing loss consistent with Dr. Panian's opinion that a certain amount of appellant's hearing loss was secondary to employment factors.

In a December 8, 1987 memorandum the Office audiology consultant calculated that appellant had 38 percent binaural hearing loss.

In a December 10, 1987 decision, the Office issued a schedule award for a 38 percent loss of binaural hearing.

The Board finds that appellant has no more than a 38 percent hearing loss.

Appellant was examined by several otolaryngologists: Dr. Myers, Dr. Simons, Dr. Schleuning, Dr. Kuhn, Dr. Keaton, Dr. Chan, Dr. Chamberlain and Dr. Panian. Each of these otolaryngologists submitted audiograms and reports about appellant's hearing loss based on these audiograms. An Office audiology consultant recommended additional testing because he considered the results of the most recent evaluation to be invalid. The role of the audiology consultant, however, is restricted to providing an opinion only on questions presented to him concerning the measurement of a claimant's hearing loss. Determination of legal standards in regard to such medical questions are outside his role.[3] The deputy assistant administrator had the discretion in this case to accept the claim rather than continue with further development of the medical record. He also had the discretion to agree with the proposal of appellant's attorney to use the report of one of the otolaryngologists of record. In view of the lengthy development of this case, it was appropriate for the Office to concur with the attorney's suggestion to use Dr. Simons' report and audiogram for calculating the extent of appellant's hearing loss.

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[3] *See Daniel Morris*, Docket No. 87-1527 (issued June 20, 1988) and cases cited therein.

The Federal Employees' Compensation Act schedule award provision sets forth the number of weeks of compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.[4] The Act, however does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office.[5] However, as a matter of administrative practice the Board has stated: "For consistent results and to insure equal justice under law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants."[6]

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984) using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second. The losses at each frequency are added and averaged and the "fence" of 25 decibels is deducted since, as the *Guides* point out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss. The lesser is multiplied by 5, then added to the greater loss and the total is divided by 6 to arrive at the amount of the binaural hearing loss.[7] The Board has concurred in the Office's uses of this standard for evaluating hearing losses for schedule award purposes.[8]

The Office audiologist applied the Office's standardized procedures to the March 2, 1987 audiogram performed by Dr. Simons. Testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 55, 50, 40 and 40. These decibel losses were totalled at 185 and divided by four to obtain the average hearing loss at those cycles of 46.25 decibels. The average of 46.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 21.25 decibels for the right ear. Testing for the left ear at the frequency levels of 500, 1000, 2,000 and 3,000 cycles per second revealed decibel losses of 55, 55, 80 and 100. These decibel losses were totalled at 290 decibels and divided by four to obtain the average hearing loss at those cycles of 72.5 decibels. The average of 72.5 was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 47.5 decibels for the left ear. The average decibel loss of each year was multiplied by 1.5 to equal a 31.88 percent loss in the right ear and a 71.25 percent loss in the left ear. The 31.88 percent loss in right ear was then multiplied by 5. This sum was that added to the 71.25 percent loss of the left ear and the resulting sum was divided by 6, yielding a calculation of a 38 percent binaural hearing loss. The Office audiologist, therefore, properly used the Office's standardized procedures to determine that appellant had a 38 percent binaural hearing loss.

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[4] 5 U.S.C. section 8107.

[5] *Richard Beggs,* 28 ECAB 387 (1977); *Danniel C. Goings,* 37 ECAB 781 (1986).

[6] *August M. Buffa,* 12 ECAB 324 at 325 (1961); *Henry L. King,* 25 ECAB 39 at 44 (1973).

[7] FECA Program Memorandum No. 272 (issued February 24, 1986).

[8] *Danniel C. Goings, supra.*

The decision of the Office of Workers' Compensation Programs, dated December 10, 1987, is hereby affirmed.

In the Matter of RICHARD F. HINES *and* U.S. POSTAL SERVICE, POST OFFICE, Van Wert, Ohio

Docket No. 88-1166; Submitted on the Record;
Issued September 30, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant's disability commencing March 18, 1986 due to a heart condition is causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.

On April 18, 1986 appellant, then a 52-year-old letter carrier, filed a claim for occupational disease asserting that his disability commencing March 18, 1986 due to a heart condition was causally related to factors of his federal employment. He stopped work on March 18, 1986 and has not returned.

Through the employing establishment, the Office of Workers' Compensation Programs provided appellant with a list of factual and medical information necessary to process his claim, including a detailed description of factors of employment believed to be responsible for his condition and a comprehensive medical report containing the doctor's opinion, with reasons for such opinion, as to the relationship between any condition diagnosed and identified factors of employment.

In a letter dated February 10, 1987 appellant indicated that there was "pressure on the carrier to get the mail out and . . . not to take overtime or sick leave"; that the mail was "getting quite heavy" requiring "a stop at every house"; that due to his hospitalizations in December 1984, January 1985 and February 1985 for hypertension and hiatal hernia, the employing establishment referred him to Dr. Colglazier who interviewed him, without examination, on February 7, 1985 and recommended that he transfer to a clerk position to reduce stress; and that because of the employing establishment's failure to provide him with a suitable position with comparable pay and working hours, he elected to remain as a letter carrier. Appellant then stated:

> "I . . . go back to carrying [mail]. I notice I am fatigued but feel that all the [hospital] emergency calls had taken a little out of me. . . . I did not have any real severe chest pains as I had experienced at the end of 1984 and beginning 1985 till March 1986. . . . [O]n March 18, 1986 at Van Wert Post Office I begin to get sick. I asked Superintendent . . . if . . . the custodian . . . could take me home to get medicine. . . . [A]round 11:30 a.m. I was doubled over in pain. I told [the custodian] I was having a hiatal hernia attack, and he insisted I go with him to the emergency room. We went, and I was put in the intensive care unit. . . ."

Appellant also stated in the letter that he was unable to get any of his doctors to provide the comprehensive report requested by the Office, and submitted the medical records he was able to obtain.

The voluminous medical records submitted by appellant included the following. A report of hospitalization from February 19 to 23, 1983, by Dr. Joseph D. Herman, an internist, indicated that appellant was hospitalized for "bilateral arm pain"; that the family history was "positive for a ruptured aneurysm with intracerebral hemorrhage in the patient's mother, positive for sudden death, assumed to be cardiac in nature, in the patient's father [and] strongly positive for hypertension"; that appellant had a "60-pack-a-year smoking history"; and that the discharge diagnoses were hypertension, bilateral arm pain, etiology undetermined, and hypercholesterolemia.

In progress reports dated March 3, 1983 through November 21, 1983 Dr. Herman discussed his treatment of appellant's hypertension.

A report of hospitalization from May 16 to 19, 1984, by Dr. Herman indicated that appellant "presented with an approximately four to five day history of increasing cough and fever to 101 degrees," and that the discharge diagnosis was left lower lobe pneumonia and controlled hypertension.

In a report dated January 2, 1985 Dr. Herman stated:

> "I saw [appellant] on December 28, 1984. He had presented with complaints of chest pain and described a burning sensation in the substernal area with radiation to both shoulders. There was no definite relationship to time of day or to activity. The pains were all self-limited, all lasting approximately five minutes.
>
> "In my office [he] was having an episode during my examination, so I gave him a dose of antacids. Within two minutes the pain had relented.
>
> "I suspect that [he] has esophageal reflux. . . . I had also instructed him to continue on his antihypertensive medications. . . ."

In a note dated February 5, 1985 Dr. Jack H. Cox, a Board-certified family practitioner, stated, "[Appellant] is a patient under my care. He has the following diagnoses of essential hypertension, reflux esophagitis."

In a report dated March 22, 1985 Dr. Herman indicated that appellant's hypertension was "well-controlled" and his esophageal reflux condition was also "controlled quite well," and that "these two conditions in no way restrict his activity and would in no way prevent him from carrying out the duties of a mail carrier." [1]

In a hospital admission summary dated March 18, 1986 Dr. Herman stated:

> "[Appellant] presented with an approximately four-hour history of chest pain."

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[1] Appellant stated in his February 10, 1987 letter that because he could not afford to work for less than full-time in a clerk position which the employing establishment offered him, he "ask[ed] Dr. Herman to write a letter stating [he] was fit to carry [mail]."

* * *

> "The patient admits episodes of pain similar to this approximately two times per week over the past two to three months. Most of the episodes have been associated with diaphoresis and occasionally associated with nausea. The pains have been much less severe than the one which prompted this admission and have also been more short-lived. The longest episode of pain that he experienced at home was approximately 20 to 30 minutes."

In a discharge summary dated April 15, 1986 Dr. David A. Kaminskas, a Board-certified internist with a subspecialty in cardiovascular diseases, stated:

> "The patient does have a history of hypertension and smokes one package of cigarettes per day. The patient's family history is also very positive for coronary artery disease with his brother dying in his 50's from myocardial infarction.
>
> "Hospital Course: The patient had cardiac catheterization soon after admission. . . . It was decided to . . . go on to coronary bypass surgery. . . .
>
> "Dr. Csicsko performed the surgery."

* * *

> "Final impression: (1) Severe triple-vessel coronary artery disease, moderate-severe left ventricular dysfunction, status postcoronary bypass surgery with five grafts placed; (2) Transient renal failure postoperatively; (3) Ventricular arrhythmias; (4) History of smoking and hypertension."

In a report dated September 9, 1986 Dr. Robert M. King, a specialist in cardiovascular diseases, discussed appellant's history and the findings on examination, and made recommendations regarding diet and activity.

By letter dated March 2, 1987 the Office requested that appellant provide the factual and medical evidence previously requested, and informed appellant:

> "Please be reminded that it is your responsibility to identify the specific factors of employment you believe caused or aggravated your condition and to provide medical evidence support-

> ing causal relationship between the disease or illness and your employment. . . ."

In a letter dated April 30, 1987 appellant stated:

> "On March 12, 13, 14 and 15th I carried a regular city route. On Friday, March 14, I helped load a Ryder van: my son-in-law had just been stationed to the State Patrol Post at Swanton. . . . We started loading at 7:00 p.m. and finished at 10:00 p.m. . . . I arrived home about 10:45 p.m. and went to bed. March 16th was a Sunday—no unusual activity. Monday, March 17th, I carried a regular city route. The next morning, March 18th, my wife took me to work—she was going to Swanton to help my daughter fix up the apartment. . . . I began to get sick around 8:30 a.m. but continued to work. About 8:45 a.m. I took a Reglan prescribed by Dr. Herman for pain. . . . They admitted me into intensive care at Van Wert County Hospital."

Appellant also indicated that since 1968 he was a head coach for "Pal Football (9–12 year-olds)" and that for the last two years he was assistant coach.

By letter dated March 26, 1987 the Office informed appellant that he must submit within 30 days additional evidence including a description of specific employment factors which are attributable to his heart condition and a detailed medical report from his attending physician.

In a letter dated May 29, 1987 appellant stated that none of the doctors involved would provide the requested report.

An Office medical adviser reviewed a statement of accepted facts and the medical records, and on July 20, 1987 reported:

> "Diagnosis: (1) Hypertension; (2) Hypercholesterolemia; (3) Smoker; (4) Atherosclerotic heart disease, coronary artery disease status post myocardial infarction.
>
> "This patient has many risk factors for coronary artery disease including family history, smoking, high blood pressure and high cholesterol. These were not well-controlled before his heart attack. To claim that working as a mail carrier caused the heart attack is unwarranted. To claim acceleration/aggravation is also unwarranted. . . ."

In a report dated August 4, 1987 Dr. King indicated that he had treated appellant for the past year and stated, "It is [my] opinion that this patient is totally and permanently disabled from his usual occupation of mail carrier."

By compensation order dated September 3, 1987 the Office rejected the claim, finding that appellant had failed to meet his burden of proof in submitting sufficient medical evidence to establish his claim.

By letter dated September 16, 1987 appellant requested an "oral hearing" and requested a copy of the "complete file."

By letter dated September 29, 1987 the Office provided appellant with a copy of his file.

By letter dated October 12, 1987 appellant requested that the Office "send" him a "review of the written record" for his case.

In a letter dated October 20, 1987 to the employing establishment, with a copy to appellant, the Office indicated that appellant had requested a review of the written record, that any relevant comments or documents may be submitted within 15 days, and that "[f]ollowing a study of the record and any evidence submitted, the Office representative shall decide the claim and inform the claimant . . . of the decision."

By decision dated November 4, 1987, made final the same day, an Office hearing representative affirmed the Office's prior decision, finding that appellant had failed to meet his burden of submitting sufficient factual and medical evidence to establish his claim.

In a letter dated December 1, 1987 appellant indicated that his October 12, 1987 letter was not intended to request a written review in lieu of an oral hearing, and requested a "verbal hearing."

By decision dated March 21, 1988 the Office rejected the hearing request, stating:

> "Since you cannot have an oral hearing and a review of the written record at the same time, as explained in your appeal rights, your request of October 12, 1987 to have a review of the written record was granted since it superseded your September 16, 1987 request for an oral hearing. In addition, if you disagreed with our interpretation of your October 12, 1987 letter you still had time to notify this Office that you still wished an oral hearing rather than a written review because on October 20, 1986 this Office notified your agency by letter, with a copy sent to you, that a review of the written record was taking place in your case."

The Board finds that appellant has failed to meet his burden of proof in establishing that his disability commencing March 18, 1986 due to a heart condition was causally related to factors of his federal employment.

An individual seeking compensation benefits has the burden of establishing the essential elements of his claim. Thus, appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which he seeks compensation is causally related to his employment. As part of this burden appellant must present rationalized medical opinion evidence showing causal relationship based upon a proper factual and medical background. Neither the fact that the condition became apparent during a period of employment nor the belief of the employee that the condition was caused by employment conditions is sufficient to establish the causal relationship, which must be established by medical evidence.[2]

Appellant contended, *inter alia,* that the weight of the mail was quite heavy and that there was "pressure on the carrier to get the mail out" within designated working hours. However, he failed to submit any medical evidence showing a causal relationship between any employment factor and his disabling heart condition. None of the medical evidence submitted by appellant contained a discussion of causal relationship, although some of the reports indicated that appellant had a positive family history for hypertension and heart condition. Additionally, an Office medical adviser reviewed the evidence and reported on July 20, 1987 that appellant's coronary artery disease was related to the "many risk factors . . . including family history, smoking, high blood pressure and high cholesterol . . . [which] were not well-controlled before his heart attack," rather than due to factors of his federal employment. The Board therefore finds that appellant has failed to meet his burden of submitting sufficient medical evidence to establish his claim.

The Board further finds that the Office properly denied appellant's request for an oral hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant for compensation not satisfied with a decision of the Secretary . . . is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." [3] Section 10.131 of the federal regulations implementing this section of the Act provides:

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[2] *Pamela A. Harmon,* 37 ECAB 263 (1986); *Mary J. Briggs,* 37 ECAB 578 (1986); *Nathaniel Milton,* 37 ECAB 712 (1986).

[3] 5 U.S.C. section 8124(b)(1).

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> "(a) A claimant is not entitled to an oral hearing . . . if review of the written record as provided by paragraph (b) of this section has been obtained. . . . A claimant may change his or her selection of an oral hearing to a review of the written record as provided by paragraph (b) of this section. . . .
>
> "(b) In lieu of an oral hearing, a claimant shall be afforded an opportunity for a review of the written record by an Office representative designated by the Director. Such review will not involve oral testimony or attendance of the claimant; however, the claimant may submit any written evidence or argument which he or she believes relevant. . . . Where timely request for a review of the written record is received, the Office shall furnish the employing agency with a copy of the claimant's request and allow 15 days for the agency to submit any comments and/or documents which it believes relevant and material to the issue in question. Any comments or documents submitted by the agency are subject to review and comment by the claimant within 15 days following the date the Office sends any such agency submission to the claimant. Following a review of the record and any evidence submitted, the Office representative shall decide the claim and inform the claimant . . . of the decision." [4]

Thus, a claimant has a choice of requesting an "oral hearing" or a "review of the written record" pursuant to section 8124 of the Act and the implementing regulation. However, once the Office has issued a decision pursuant to a review of the written record, a claimant is not entitled to a subsequent oral hearing. The Board notes that these provisions were included in the statement of appeal rights attached to the Office's September 3, 1987 compensation order.

In the instant case, appellant initially requested an oral hearing by letter dated September 16, 1987. However, by letter dated October 2, 1987 he requested a "review of the written record." In accordance with appellant's request the Office undertook a review of the written record under section 10.131(b) of the regulations and issued a decision on November 4, 1987. Appellant was thus not entitled to an oral hearing after having had his case reviewed on the written record.

The decisions of the Office of Workers' Compensation Programs dated November 4, 1987 and March 21, 1988 are hereby affirmed.

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[4] 20 C.F.R. section 10.131, (rev. April 1, 1987, eff. June 1, 1987).

In the Matter of Harvey Jacobs, Jr. *and* Federal Works Agency, Public Building Administration, Kansas City, Mo.

Docket No. 88-926; Submitted on the Record;
Issued September 30, 1988

Before George E. Rivers, David S. Gerson, Michele von Kelsch

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof in establishing that the position of part-time security guard fairly and reasonably represents appellant's wage-earning capacity effective July 5, 1987.

On March 11, 1948, appellant, then a 23-year-old elevator operator, sustained multiple injuries to his left leg while in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for "fracture of the left femur and laceration of the left leg" and paid appellant compensation benefits for his lost time from work from March 29, 1948 to September 20, 1948. The record indicates that appellant returned to his usual employment on September 21, 1948.

On December 30, 1981, appellant filed a notice of recurrence of disability with accompanying medical evidence alleging that in October 1981 he experienced pain in his left leg causally related to his March 1948 employment injury.[1] Based on the medical evidence submitted, the Office accepted appellant's claim of recurrence of disability and accepted that his diagnosed conditions of "deformity of the distal femoral diaphysis and metaphysis and degenerative joint disease of the left knee" were causally related to his March 11, 1948 employment injury. The Office authorized payment to appellant of compensation for temporary total disability commencing January 23, 1984, the date he claimed total disability commenced, and placed him on the automatic compensation rolls effective February 22, 1984. The record indicates that the Office authorized, and appellant underwent, left total knee replacement on February 21, 1984.[2]

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[1] The record indicates that appellant worked at the employing establishment from 1948 to 1951; at the Department of Agriculture as a stockroom clerk from 1952 to 1956; at the U. S. Postal Service as a railway mail clerk from 1956 to 1968; at Mercantile Bank and Trust as a stockroom manager from 1968 to 1978 and as a security guard for the City of Kansas City from 1978 until he stopped work in January 1984.

[2] The record indicates that the Office noted that in addition to his employment-related disabilities appellant had nonemployment-related conditions of left L-5 radiculopathy and lung cancer.

In February 1986, the Office noted that medical reports submitted by appellant's physicians indicated that appellant was capable of part-time light-duty employment. By letter dated February 27, 1986, the Office authorized a private rehabilitation counselor to evaluate and plan a vocational rehabilitation program to assist appellant in his return to employment.

The record indicates that appellant commenced participation in the vocational rehabilitation program on March 21, 1986 and concluded the program on December 23, 1986. During the course of the rehabilitation program, the counselor submitted periodic reports to the Office documenting appellant's cooperation with, and progress toward, finding employment. In a July 21, 1986 report, the counselor reported that appellant "has made extensive efforts to follow through with all jobs" to which he had been referred but that the "results have been similar in that the employers are suspect of his physical capacities and are not seeking part-time employees." The counselor noted that appellant had been denied the job of school crossing guard by the local police department, for which he had been required to submit his medical records and take a physical examination as part of the application process, due to his "lack of mobility." In an August 25, 1986 report, the counselor reported that appellant had been unable to obtain employment that requires standing and walking such as a security guard, crossing guard or a guide. In an October 2, 1986 report, the counselor reported that appellant was continuing to "experience difficulty in finding employment within his restrictions" and recommended that efforts be expended to identify possible part-time sedentary work. In a December 1, 1986 report, the counselor stated that appellant interviewed or sought employment with ten agencies or private employers only to be rejected "due to his age, need for only part-time employment and the restrictions his disability has incurred." A similar statement was made in the counselor's final report dated December 23, 1986. He stated that during the course of the program, appellant pursued ten possible employment opportunities but was refused employment on each occasion due to his "limited duty [requirement], medical problems or his age." The counselor noted, however, that the positions of part-time security officer and part-time traffic police officer are reasonably available within appellant's commuting area and listed the approximate salary for each position but also noted that due to appellant's "ongoing health problems, constant medical treatments and age . . . successful placement is not feasible at this time."

By letter dated January 14, 1987, the Office requested that appellant submit an updated medical report on the status of his condition. Appellant submitted the March 31, 1987 report of Dr. L. F. Glaser, a Board-certified orthopedic surgeon and appellant's principal treating physician for the last several years. Dr. Glaser reported that he examined appellant in early February 1987 and that, at that time, physical examination of both knees "revealed a full range of motion and neither knee was warm to touch" and that appellant "had no effusions palpable . . . no angular deformities of significance . . . [and] had normal neurovascular function of both lower extremities." Dr. Glaser stated that x-ray examination of both knees "showed excellent placement of the total knee placement of the total knee prostheses and no obvious evidence of loosening or infection." In this report, Dr. Glaser also reviewed appellant's medical history, and based on this history, his findings upon examination and the statement of accepted facts furnished by the Office, diagnosed "left total knee replacement, post degenerative changes nonwork related." Dr. Glaser enclosed with his report a work restriction evaluation form setting forth appellant's work tolerance limitations which included restrictions on activities that require any more than six hours, on an intermittent basis, of either, or a combination of, sitting, walking, lifting, bending or standing, and excluded any activities involving squatting, climbing or kneeling, and he restricted appellant to a six-hour work day.

Following receipt of Dr. Glaser's report, the Office proceeded to develop the case record to determine appellant's wage-earning capacity. Appellant's case was referred to an Office wage-earning capacity specialist who, on a job classification form (Form CA-66), selected the job of part-time security guard [3] as suitable for appellant noting that appellant had prior experience as a security guard, that the physical requirements for the job were primarily light duty, requiring lifting to no more than twenty pounds and the ability to reach, handle, finger, feel, talk and hear, and were therefore compatible with the work tolerance limitations imposed by Dr. Glaser. With respect to the availability of part-time security guard positions, the Office specialist noted that the private rehabilitation counselor in his final report dated December 23, 1986 had reported that such positions were reasonably available on part-time basis within appellant's commuting area. The record indicates that the Office contacted the private rehabilitation counselor on May 7, 1987 to determine whether part-time security guard positions continued to remain available in appellant's commuting area. In a response of the same date, the private rehabilitation counselor informed the Office that the positions of security guard/watchman were reasonably available on a part-time basis within the metropolitan area in which appellant lived.

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[3] Code number 372.667-034 in the Department of Labor's *Dictionary of Occupational Titles* (4th ed. 1977).

Following selection of the security guard position, an Office medical adviser, at the request of the Office, reviewed Dr. Glaser's report and the job description and physical requirements for the security guard position and, in a report dated May 5, 1987, stated that he believed appellant was physically capable of performing the duties of a security guard with the exception that appellant may not be physically capable of "apprehending or expelling miscreants or enforcing a security measure," duties listed in the job description, if the performance of such duties require "extreme physical exertion."

By letter dated May 22, 1987, the Office notified appellant that it proposed to reduce his monetary compensation payments because the medical evidence of record established that he was no longer totally disabled for employment and that it had been determined that he was physically qualified for, and capable of performing the duties of, a part-time security guard and that such position represented his wage-earning capacity. The Office enclosed with its letter a copy of Dr. Glaser's March 31, 1987 report and accompanying work restriction evaluation form, the job description and physical requirements of a security guard and the Office's computation of appellant's adjusted compensation payments based on his wage-earning capacity as a part-time security guard. The Office informed appellant that if he disagreed with the proposed action he may submit additional factual or medical evidence or argument relevant to the issue of his ability to perform part-time employment. The record indicates that appellant did not respond to this letter.

By letter decision dated July 17, 1987, the Office reduced appellant's compensation benefits, effective July 5, 1987, on the basis of his ability to perform the duties of a part-time security guard. Applying the formula set forth in the *Shadrick* decision,[4] the Office determined that appellant had a 35 percent wage-earning capacity or, alternatively, a 65 percent loss of wage-earning capacity.

By letter dated February 18, 1988, appellant requested reconsideration of the Office's July 17, 1987 decision and in support of this request stated that he had accepted a part-time custodial management position, upon Dr. Glaser's opinion that he could return to work but his reemployment caused him "substantial pain and additional disability." Appellant claimed that he was totally disabled for work and requested that his full disability payments be reinstated. In support of his request, appellant submitted the Office notes from his treating physicians at the Prime Health Stadium Care Center, the majority of which addressed the status and treatment of appellant's nonemployment-related conditions. Those notes possibly referencing appellant's accepted employment-related left leg conditions include a July 20, 1987 entry of Dr. Mary Coltharp, a Board-certified internist, who reported on this date as follows:

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[4] *Albert C. Shadrick*, 5 ECAB 376 (1953).

> "Patient went back to work as per Dr. Glaser's advice, four hours per day. The last two to three weeks, he has been managing a janitorial team of pushing the brooms and mops and stuff and it caused him to really have a lot of knee pain. * * * I doubt that the patient is really able to work four hours a day, when you combine the knee disease with the previous lobectomy for lung cancer and his pulmonary insufficiency."

Dr. Coltharp, however, did not distinguish whether appellant's complaints of knee pain pertained to appellant's left knee, right knee or both. In a July 28, 1987 entry, Dr. F. Adler, a Board-certified orthopedic surgeon, reported:

> "Patient complains of pain discomfort in both lower extremities and also recent onset of pain in his left hip area. He has been unable to work consistently because of pain when being upright for any length of time and his legs giving way. He has full extension of both knees. Flexion to 90 degrees. There is no effusion. There is mild crepitus of flexion-extension in both knees. Stability is adequate. . . . Considering patient's bilateral knee replacement and potential new hip pathology, I believe that he is a candidate for a sedentary occupation only. [I] do not believe that he can handle any occupation that requires standing or walking for any length of time."

In an August 21, 1987 entry, Dr. Coltharp stated that: "[appellant] still has considerable difficulty with his legs and his knees, due to the arthritis and the total knee replacement. He has been unable to return to work. He has no new symptoms." In a September 21, 1987 entry, Dr. Ronald Stitt, a Board-certified internist, noted that appellant was beginning to have knee pain but did not indicate whether the pain was in appellant's right or left knee or both. Dr. Coltharp reported that appellant's knee pain was "nonspecific" and noted that there was no evidence of particular swelling or of increased warmth or other specific signs or symptoms."

By compensation order dated March 10, 1988, which incorporated a memorandum summarizing the evidence, the Office reviewed appellant's case on the merits under 5 U.S.C. section 8128 and denied modification of its July 17, 1987 decision on the basis that the evidence submitted in support of reconsideration was insufficient to warrant modification of the prior decision. The Office found that appellant had not submitted evidence to support that the Office's wage-earning capacity determination of July 17, 1987 was improper. The Office noted that the treatment notes of appellant's physicians did not establish total disability and indicated that the degree of appellant's continued disability was attributable to a combination of his medical problems and not specifically to his accepted employment conditions. The Office pointed out that since these other medical problems, namely appellant's lung cancer, his pulmonary problems, his right knee and left hip conditions, did not exist at the time of appellant's March 11, 1948 employment injury, and were not accepted as employment related by the Office, such conditions cannot be considered in determining the degree of appellant's employment-related disability.

The Board finds that the Office has not met its burden of proof in establishing that the position of part-time security guard fairly and reasonably represents appellant's wage-earning capacity effective July 5, 1987.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits it has the burden of justifying a subsequent reduction in such benefits.[5]

The Board finds that the evidence on which the Office based its July 17, 1987 decision does not establish that the position of part-time security guard represents appellant's wage-earning capacity.

In the instant case, the Office made a determination, based on the medical evidence of record, that appellant was no longer totally disabled for employment and could undertake light-duty part-time employment. The March 31, 1987 report of Dr. Glaser, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant could perform light-duty employment and in an accompanying work restrictions evaluation set forth appellant's work tolerance limitations and restricted appellant to a six-hour work day.

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[5] *Samuel J. Russo,* 28 ECAB 43 (1976); *Harold S. McGough,* 36 ECAB 332 (1984).

In accordance with its established procedures for determining wage-earning capacity,[6] the Office then referred appellant's case to an Office wage-earning capacity specialist for selection of a suitable position for appellant. The Office specialist selected the position of part-time security guard as suitable for appellant given his experience and physical limitations. An Office medical adviser, at the request of the Office, reviewed Dr. Glaser's report and the job description of a security guard and noted that the duties of this position include "apprehending or expelling miscreants" and expressed reservations that appellant was physically capable of performing these particular duties if the performance of such duties require "extreme physical exertion." The Office medical adviser stated that with the exception of these duties, he believed that appellant was physically capable of performing all other duties of a security guard.

Given the reservations expressed by the Office medical adviser, the Office should have further developed the record [7] to determine whether the physical requirements for the position of security guard are applicable to all duties of the job as listed on Form CA-66 or whether the possibility exists that the physical demands of the job may be greater for certain of the duties and that, although the performance of these duties may not be required on a regular basis, an employer would expect a suitable candidate for the job to be able to meet the greater physical demands when and if required.[8] Following such determination, the Office should then have requested appellant's physician, Dr. Glaser, to review the position description and physical requirements of a security guard and provide an opinion on whether he believed appellant was capable of performing the duties of a security guard.

In addition to the question of appellant's physical ability to perform the duties of a security guard, there is also the question of whether such position is in fact reasonably available on a part-time basis within appellant's commuting area. In a report dated July 21, 1986, the private rehabilitation counselor, to whom appellant had been referred by the Office, stated that appellant was having problems finding employment because employers were suspect of his physical capabilities and "are not seeking part-time employees." In a report dated December 1, 1986, the counselor reported that appellant sought employment as a security guard, a school crossing guard and a guide "only to be refused due to his age, need for only part-time employment and the restrictions his disability has incurred." Similar statements were made in the counselor's October 2, 1986 report and in his final report dated December 23, 1986. Although in his December 23, 1986 report and May 7, 1987 response to the Office, the counselor stated that part-time security guard/watchman positions were reasonably available in appellant's commuting area, this information appears to contradict the statements made in his progress reports implying that one of appellant's problems in finding employment was his requirement of part-time work. Given these contradictory statements, the Office should have called them to the attention of the counselor and requested clarification from him on whether part-time security guard/watchman positions are reasonably available within appellant's commuting area.[9]

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[6] In accordance with the concept of wage-earning capacity, generally, when the Office makes a medical determination of partial disability and of the specific work restrictions to which the claimant is subject, the claimant's case should be referred to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, which fits the employee's capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the Board's decision in *Albert C. Shadrick*, 5 ECAB 376 (1953) will result in the percentage of the employee's loss of wage-earning capacity.

[7] *See Chester John Marzec*, 32 ECAB 1386, 1389 (1981).

[8] *See George J. Bruce*, 16 ECAB 645 (1965).

In addition to the counselor's statements implying that appellant's restriction to part-time employment was problematic, he also frequently mentioned that appellant's age is a barrier to his finding employment. Under section 8115 of the Federal Employees' Compensation Act,[10] the Office is required to consider appellant's age in determining his wage-earning capacity.[11] There is no indication from the record that the Office followed up with the private rehabilitation counselor to determine the extent to which appellant's age may make him an unsuitable employment candidate for the security guard position.

Due to the aforementioned deficiencies, the case must be remanded for further development of the record and a *de novo* determination of appellant's wage-earning capacity which takes into consideration his physical limitations, his age and all other relevant factors as required by 5 U.S.C. section 8115.[12]

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[9] *See Chester John Marzec*, note 7 *supra*.

[10] 5 U.S.C. section 8101 *et seq.*; *See* 5 U.S.C. section 8115.

[11] *See George J. Bruce*, note 8 *supra*.

[12] The Board notes that the medical evidence submitted by appellant in support of reconsideration of the Office's July 17, 1987 decision did not establish that appellant is totally disabled for work due to his accepted employment conditions. The notes of Dr. Adler implied that appellant was capable of employment provided the employment was sedentary. The notes of Dr. Coltharp stated that he "doubted" that appellant was capable of even part-time work but attributed his total disability to the combination of his medical problems and, as the Office correctly advised appellant in its March 16, 1988 decision, it cannot take into consideration conditions which are not employment related and which did not preexist the accepted condition or conditions in determining appellant's wage-earning capacity. *See John A. Zibutis*, 33 ECAB 1879, 1885 (1982).

The decisions of the Office of Workers' Compensation Programs dated July 17, 1987 and March 10, 1988 are reversed and the case is remanded for further proceedings consistent with this decision.

In the Matter of GEORGE A. MERCURIO *and* DEPARTMENT OF HEALTH & HUMAN SERVICES, ALASKA AREA NATIVE HEALTH SERVICE, Chefornak, Alas.

Docket No. 88-544; Submitted on the Record;
Issued September 30, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant had any disability from November 6, 1982 through November 17, 1983 causally related to his September 25, 1982 employment injury; and (2) whether the Office of Workers' Compensation Programs properly computed appellant's rate of pay for purposes of compensation.

On November 15, 1983 appellant, then a 67-year-old mixed gang foreman, filed a claim alleging that on approximately September 15, 1982 he injured his left hip and left leg when the cart of a three-wheel vehicle fell on top of him after he was thrown from the vehicle. On June 24, 1984 appellant filed a second claim alleging that he had sustained a ruptured disc in his spine. Appellant described the same circumstances as on the first claim form, but stated September 25, 1982 as the date of injury.

In support of his claim appellant submitted a March 24, 1983 treatment record from Temple University Health Sciences Center which noted appellant's complaints of pain "radiating down the left paraspinal muscles . . . down the posterior thigh to the knee." Appellant had a history of back problems dating back to 1971 when he had a spinal fusion done at the Veterans Administration Hospital. X-rays revealed "some evidence of degenerative arthritis in the inner discal joint between 3-4 and 4-5."

When appellant returned to Alaska he was seen by Dr. Robert Martin. On October 19, 1983 the doctor noted that appellant did not "appear to be in any acute distress." Due to appellant's "persistence in discomfort and lack of significant improvement of manipulating [the] SI [sacroiliac] joint" Dr. Martin requested a computerized tomography (CAT) scan and an electromyogram (EMG).

The CAT scan revealed an L3-4 disc protrusion, and the EMG showed an L5 radiculopathy on the left.

On referral from Dr. Martin, appellant was evaluated on November 7, 1983 by Dr. George B. Wichman, a Board-certified orthopedic surgeon. When Dr. Wichman reevaluated appellant on November 14, 1983 his back was splinted; he was tender over the lower part of his surgical incision from the back fusion; he exhibited equal achilles reflexes and patella reflexes; he had hypesthesia in the lateral aspect of his leg; and a positive straight leg raising sign at 35 degrees. Dr. Wichman concluded that appellant had an "S1 radiculopathy that [was] quite functionally incapacitating because of severe pain." For this reason the doctor stated that appellant was being hospitalized.

On November 18, 1983 appellant was hospitalized for a diagnostic work-up and conservative treatment for "severe left leg pain and pain in the low back." A myelogram performed showed "a ruptured disk at L3-4 level with distal displacement of the rupture." Dr. Robert Fu, Board-certified in physical medicine and rehabilitation, evaluated appellant and concluded that his findings were consistent with "either a free fragment rupture, probably on a higher level which would come from the L3/L4 or he might have a spinal stenosis problem." Dr. Fu recommended a decompression procedure; however, because of personal reasons and slight improvement of the pain, appellant declined surgical intervention. Appellant was discharged from the hospital on November 23, 1983.

In an August 8, 1984 letter the employing establishment stated that appellant's position was "an intermittent position with work generally being performed during the summer months; however, work is never guaranteed." The letter further stated:

> "Mr. Mercurio was working late in June of 1983. By his own admission in my office on July 26, 1984 . . . he had been assigned to a construction project for the summer and had come into Anchorage to order supplies. He was given a one day notice to return to the work site and refused. He has not been called since that time. There was no indication that he was not physically able to work the summer of 1983. There was no work available for him from November, 1982 until he returned in June."

An Office of Workers' Compensation Programs medical adviser reviewed the case record on August 15, 1984 and concluded there was no evidence relating appellant's condition to a 1982 employment injury. The medical adviser stated that the only findings were an old fusion at the L4 level with secondary degenerative changes above the fusion with spinal stenosis.

By letter decision dated January 21, 1985 the Office found that appellant had not met his burden of proof in establishing that his condition was causally related to factors of his federal employment.

At appellant's request, a hearing was held on July 16, 1985 before an Office hearing representative. Appellant testified that he continued to work immediately following the September 25, 1982 injury, until his job ended in October 1982. He explained that the job closed because of the weather, and was supposed to reopen the following spring. Appellant stated that he did not stop working because of his back condition but because the "job shut down." He stated that he initially sought medical attention when he arrived in Philadelphia in November 1982. Appellant stated that when he returned to Alaska in May or June of 1983 he went back to the employing establishment but his position had been filled by someone else. Appellant testified that his back continued to worsen until he saw Drs. Martin and Wichman, and was finally hospitalized.

Prior to the hearing appellant submitted statements from three coworkers who witnessed the September 25, 1982 injury.

Subsequent to the hearing appellant submitted a February 15, 1985 report from Dr. Bong S. Lee, a Board-certified orthopedic surgeon, who related a history of the 1982 injury, appellant's medical history, his findings on physical examination, and diagnostic test results. Dr. Lee diagnosed "severe internal derangement of the lumbosacral spine with evidence of S1 radiculopathy" which had been "persistent" since September 1982. The doctor further stated that appellant's "back condition certainly caused his disability since October 1982." In a May 30, 1985 report Dr. Lee noted that a myelogram demonstrated extradural defect on the left side of L3-L4 consistent with a herniated nucleus pulposus. The doctor recommended a laminectomy and removal of the herniated nucleus pulposus. On July 26, 1985 Dr. Lee stated: "I feel his [appellant's] present condition is the result of the injury sustained on September 25, 1982, while on his job."

In addition, appellant submitted two reports from Dr. Parviz Kambin, a Board-certified orthopedic surgeon. In the first report, dated July 1, 1985, Dr. Kambin concurred with Dr. Lee that appellant had "signs and symptoms of root irritation and compression at the lower lumbar spine, most likely due to disc herniation at L3-L4 level." In the second report, dated July 24, 1985, Dr. Kambin related appellant's condition to the September 25, 1982 employment injury.

By decision dated September 25, 1982 the Office hearing representative found that appellant had established "that an employment-related vehicle accident did in fact occur on September 25, 1982 as claimed." The hearing representative further found that while the medical evidence was insufficient to discharge appellant's burden of proving by the weight of the reliable, substantial, and probative evidence that his back condition was causally related to the September 25, 1982 injury, it was sufficient to require further development of the record by the Office.

On remand, the Office medical adviser reviewed the case record on January 30, 1986 and opined that there was no medical evidence that the 1982 injury had any effect on appellant's current condition. The medical adviser stated that Drs. Lee and Kambin did not provide any medical rationale as to how they could determine that appellant's condition in 1985 was causally related to a specific incident in 1982. The medical adviser opined that appellant's current condition was "completely compatible with the natural progression of the preexisting condition." He stated that the findings were "consistent with old surgery and fusion L4 to the sacrum and degenerative changes (which occur with time) at the level above the fusion."

Due to the conflict in medical opinion between the Office medical adviser and appellant's attending physicians, the Office referred appellant, together with a statement of accepted facts and the entire case record, to Dr. John T. Williams, a Board-certified orthopedic surgeon, for an impartial evaluation.

With respect to his March 20, 1986 evaluation of appellant, Dr. Williams concluded that appellant sustained "an acute lumbosacral sprain strain" on September 25, 1982, which by history had resolved. Dr. Williams found no evidence of a herniated disc. He concluded that appellant's current problems were not related to the 1982 injury but was "the continuation of the natural progression of degenerative joint and disc disease."

Appellant was hospitalized from July 1 through July 8, 1986. On July 2, 1986 he underwent a left laminectomy at L3-L4 with removal of herniated disc.

By letter decision dated July 10, 1986 the Office accepted that appellant "sustained a low back strain, while in the performance of duty on September 25, 1982, and that the strain was temporary, and had resolved by November 1982." Thus, the Office denied appellant's claim for wage loss.

Appellant requested reconsideration, and submitted a July 14, 1986 report from Dr. Michael J. O'Connor, a Board-certified neurosurgeon, which stated as follows:

> "* * * Prior to surgery, he [appellant] had severe low back and left leg pain which had started three weeks after an accident in 1982, in which a three wheel Honda pulling a trailer, turned over backwards on top of the patient while going up a hill. He had low back pain from that night forward and it became much more severe and associated with left leg pain after about three weeks.
>
> "It should be noted that although he had had a lumbar laminectomy at the L4-5 and L5-L1 level with fusion in 1982, he had had an excellent relief of pain and worked steadily without back pain from 1972 up until 1982.
>
> "Based on this history, I feel that the Honda accident is causatively related to the injury for which I operated upon."

In a subsequent report dated August 19, 1986 Dr. O'Connor stated the following:

> ". . . it is my medical opinion that the L3-4 herniated disc that was demonstrated on myelogram in 1983 and removed by me in 1986, was due to an accident in 1982 when a three wheel Honda fell on him. I have come to this opinion because the onset of pain was essentially immediately after the accident and persistent from that time forward. I do not believe it is related to his 1972 surgery, since it was at a different level than the previous surgery and since he had done well from 1972 to 1982."

A different Office medical adviser reviewed the case record on December 23, 1986 and concluded that appellant's condition, surgery in 1986, and disability was sufficiently medically reasoned and documented by three specialists as causally related to the September 25, 1982 injury.

In response to a request from the Office, Dr. O'Connor indicated that appellant was capable of performing light duty effective January 30, 1987.

By compensation order dated April 24, 1987 the Office vacated its July 10, 1986 decision which rejected appellant's claim for compensation.

In response to a request from the Office to provide information concerning appellant's employment, the employing establishment stated that appellant was hired on July 20, 1981 as "a term intermittent employee" on a "four year term appointment." The employing establishment explained that appellant's job was "seasonal employment and usually runs from June into October each year." Time sheets submitted indicated that appellant worked 67.5 regular and 30.5 overtime days in 1981 (during the period July 19 through November 21, 1981); 85.75 regular and 27 overtime days in 1982 (during the period May 23 through November 6, 1982); and seven regular and three-fourths overtime days in 1983 (during the period June 19 through July 16, 1983). The employing establishment noted that work was available for appellant in 1983 and "he had reported for work; however, he refused to return to the work site after coming into Anchorage early in July so was not called later to work." Appellant's gross pay for 1981 (exclusive of overtime) was $11,566.80. The annual earnings of a similar employee in 1981 was reported as $20,116.00.

The Office determined that appellant's pay rate was $22.44 per hour effective September 5, 1982, and $23.33 per hour effective January 23, 1983.

Pursuant to section 8114(d)(3) of the Federal Employees' Compensation Act [1] the Office determined appellant's average annual earnings as follows: $23.33 per hour times eight hours equals $186.64, times 150 equals $27,996.00. $27,996.00 divided by 52 equals a weekly pay rate of $538.38.

By compensation order dated October 13, 1987 the Office rejected appellant's claim for compensation for the period November 6, 1982 through November 17, 1983 because the medical evidence of record did not support disability for that period. The Office accepted appellant's claim for retroactive compensation payments from November 18, 1983.

With respect to the first issue, the Board finds that appellant's employment injury-related disability began November 14, 1983.

The record clearly establishes that appellant continued to work following his September 25, 1982 employment injury. Appellant stopped work on November 6, 1982. Appellant testified before the Office hearing representative that he stopped work because his job ended because of the weather and not because of his back condition. Appellant was an intermittent employee who generally worked during the summer months.

The question of whether disability exists is medical in nature. Following the September 25, 1982 injury appellant did not seek medical attention until March 24, 1983. The treatment records at that time noted appellant's complaints of pain, but did not indicate that appellant was disabled.

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[1] 5 U.S.C. section 8114(d)(3).

The record also indicates that appellant returned to work in late June 1983, but did not return to his work site when notified to do so. There is no medical evidence at that time indicating that appellant was unable to work.

The first medical evidence of record which indicates that appellant was disabled is the November 14, 1983 report from Dr. Wichman, a Board-certified orthopedic surgeon. The doctor examined appellant and stated that his condition was "functionally incapacitating because of severe pain," and that appellant was being hospitalized. Appellant was hospitalized four days later, on November 18, 1983 for diagnostic workup and conservative treatment.

As there is no medical evidence indicating that appellant was disabled from November 6, 1982 through November 13, 1982 as a result of his September 25, 1982 employment injury, he is not entitled to compensation during that period.

With respect to the second issue, the Board finds that the Office properly computed appellant's rate of pay for purposes of compensation.

Section 8114(d)(1)(2) and (3) of the Federal Employees' Compensation Act reads as follows:

> "(d) Average annual earnings are determined as follows:
>
> "(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay—
>
> '(A) was fixed, the average annual earnings are the annual rate of pay; or
>
> '(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day work week, 280 if employed on the basis of a 5½-day week, and 260 If employed on the basis of a 5-day week.'
>
> "(2) If the employee did not work in employment in which he was employed at the time of his injury during

> substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.
>
> "(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment, and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury."

Appellant worked as a seasonal employee. He did not work substantially the whole year in 1981, the year preceding his September 25, 1982 injury, nor was his position one which would have afforded him employment for substantially a whole year. Thus, subsection (3) of section 8114(d) was the applicable section for determining appellant's average annual earnings. Thus the Office used $23.33, appellant's hourly rate at the time that disability began in November 1983.[2] The Office properly multiplied the hourly rate by eight to determine appellant's daily pay rate; and then multiplied the daily rate by 150 to determine appellant's average annual earnings.

On appeal appellant contends that he worked an average of 10.5 months a year. This, however, is not supported by the record. In 1981 appellant worked from July 20, 1981 until November 21, 1981, a period of approximately four months; and in 1982 appellant worked from May 23 through November 6, 1982, a period of approximately 5.5 months. Since appellant's average annual earnings for compensation purposes could not be less than 150 times his average daily wage, the Office properly computed his compensation rate pursuant to 5 U.S.C. section 8114(d)(3).

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[2] 5 U.S.C. section 8101(4) defines "monthly pay" as the "monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time disability recurs * * *."

The October 13, 1987 decision of the Office of Workers' Compensation Programs is hereby as modified to reflect the period that appellant's employment-related disability began as November 14, 1983, and affirmed as modified.

In the Matter of EARL C. POPPELL *and* DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, Tex.

Docket No. 86-2056; Submitted on the Record;
Issued September 30, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs is barred by the six-year period of limitations of 28 U.S.C. section 2415 from recovering an overpayment of compensation made more than six years before the Office determined there was an overpayment; and (2) whether the Office abused its discretion by refusing to waive appellant's overpayment of compensation in the amount of $32,677.75.

On November 26, 1964 appellant, then a 45-year-old firefighter, filed a claim for an injury to his back sustained that day by trying to turn off a valve. Appellant stopped work on November 27, 1964, and returned on July 26, 1965 as a clerk at a retained rate of pay. This retained rate did not include a 20 percent differential appellant had received as a firefighter, and the Office began payment of compensation for loss of wage-earning capacity based on the loss of this 20 percent differential.

On April 4, 1983 the Office discovered that appellant was receiving greater benefits from the Office of Personnel Management under the Civil Service Retirement Act than he was receiving from the Office under the Federal Employees' Compensation Act. By an April 20, 1983 letter the Office advised appellant that he could not receive concurrent benefits under these two Acts, that it had terminated his compensation effective March 24, 1983, and that he was being offered a retroactive election of benefits. On October 1, 1983 appellant elected benefits under the Civil Service Retirement Act in preference to those under the Federal Employees' Compensation

Act. This election was made retroactive to June 21, 1967, the date his annuity under the Civil Service Retirement Act commenced.

On March 26, 1984 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of $32,677.75 which occurred because he received concurrent benefits from June 21, 1967 to March 23, 1983 from the Office and the Office of Personnel Management but was entitled to only one of these benefits. The Office found that appellant was without fault in the matter of this overpayment, and advised him that if he believed the overpayment should be waived, he should submit a detailed explanation of the reasons, and should complete the Office's overpayment recovery questionnaire.

Appellant completed the Office's overpayment recovery questionnaire on April 19, 1984, indicating that his total monthly income was $1,409.51 and that his total monthly expenses were $1,554.10. In response to the questions on assets, appellant indicated he had $20.00 cash on hand, a checking account balance of $250.00, and personal property worth $9,500.00, consisting of an automobile, a pickup truck, and furniture. Appellant also stated that he had a savings account balance of $46,870.00, and stated that his wife had inherited a farm, which had been sold for $46,900.00, and that his wife had inherited a one-third interest in land in Texas with value of about $50,000.00. Appellant also stated: "I myself have no assets—the only assets my wife and I have are hers by inheritance."

At a hearing held on June 13, 1984 at appellant's request, appellant's attorney stated that under California law all the property of a wife was her separate property, that she could convey such property without the consent of her husband, and that separate property was not subject to enforcement for debts of the other spouse. Appellant testified that he used the compensation payments to eat and not to invest, and that he and his wife, while receiving compensation payments, had sold the duplex house of which they had rented half and bought a new house resulting in increased monthly payments. Appellant's wife testified that her income listed on the Office's overpayment recovery questionnaire was from lease of the inherited farm, and from interest on her savings resulting from the sale of her other inherited property.

In a submitted document titled "Schedule of assets 6/10/84" appellant and his wife indicated that $38,000.00 of the $41,000.00 they had in certificates of deposit was funds belonging to the wife resulting from the sale of the real property she inherited from her uncle.

By a decision dated March 28, 1985 and made final on April 1, 1985 an Office hearing representative found that waiver of the overpayment in the amount of $32,677.75 was not warranted, as appellant had $41,000.00 in certificates of deposit when his wife's assets were considered. The hearing representative further found that appellant had not relinquished a valuable right by buying a new house and that there was no evidence of a change for the worse in this transaction. The hearing representative also found that there was no statutory period of limitations for recovery of an overpayment of compensation.

Appellant requested reconsideration, and submitted additional verification of expenses.

By a compensation order dated August 28, 1985 the Office found the additional evidence was not sufficient to warrant modification of its prior decisions.

On appeal, appellant's attorney contends that 28 U.S.C. section 2415 bars the Office from recovering any overpayment made more than six years before March 24, 1983, the date the Office terminated appellant's compensation. The attorney also contends that the separate property of appellant's wife should not be considered in the determination of whether to waive the overpayment, as it would not be considered in determining appellant's liability to repay any other debt. The attorney further contends that appellant's wife's certificates of deposit were used primarily to generate income, and that appellant and his wife relied on the compensation payments to purchase a new house and in doing so, worsened their position by no longer renting half of the duplex in which they formerly lived.

On appeal, the Director of the Office contends that 28 U.S.C. section 2415 applies to collection of an overpayment only where the Office seeks to collect the overpayment through a civil action in a court of law and not to the Office's administrative proceedings in recovering an overpayment. The Director further contends that it was proper to include the income and assets of appellant's wife in considering whether to waive the overpayment, and that appellant and his wife did not show that their conversion of part of the overpaid compensation into a new home constituted detrimental reliance because a loss was not shown.

The Board finds that the Office is not barred by the six-year period of limitations of 28 U.S.C. section 2415 from recovering an overpayment of compensation made more than six years before the Office determined there was an overpayment.

28 U.S.C. section 2415(d) provides in pertinent part: ". . . every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States . . . incident to the employment or services of such employee . . ., shall be barred unless the complaint is filed within six years after the right of action accrues."

The Board finds that section 2415(d) applies only when the government is seeking to recover an erroneous payment in a civil action in court of competent jurisdiction, and that it has no application to section 8129 of the Federal Employees' Compensation Act.[1] This interpretation is consistent with the language of section 2415(d),[2] with the legislative history of section 2415,[3] with the position of the Comptroller General,[4] with subsection (i) of section 2415 [5] and with court decisions on the application of section 2415.[6] The case of *United States v. Limbs*,[7] relied upon by appellant's attorney, involved the application of section 2415 to a suit by the government in federal court for reimbursement of amounts paid under the Federal Employees' Compensation Act out of a settlement with a third-party tortfeasor.

The Board further finds that the Office abused its discretion by refusing to waive appellant's overpayment of compensation in the amount of $32,677.75.

Section 8129(b) of the Act provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." The Office's procedure manual, as applicable to the present case, provided the clause "defeat the purpose of the Act" applied only to the beneficiaries, such as appellant, who are or were entitled to compensation benefits. The procedure manual then stated:

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[1] 5 U.S.C. section 8129 states in pertinent part: "(a) When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled." The Office's regulation promulgated under section 8129, as applicable to this case, states: "Where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his attention is called to the same, shall refund to the Office any amount so paid, or upon failure to make such refund the Office may proceed to recover the same." 20 C.F.R. section 10.314(b).

[2] This section refers to an "action" and to the filing of a "complaint."

[3] 1966 U.S. Code Cong. and Adm. News, p. 2502.

[4] In a May 8, 1979 decision, the Comptroller General concluded, based on review of court decisions, decisions of the General Accounting Office, and the legislative history, that the period of limitations in 28 U.S.C. section 2415 has no application to government collection of debts through administrative offset. This decision states ". . . the Government has the right to collect the indebtedness of its employees by means of setoff against monies owed to the employee even if direct action to collect the debt would be barred by the statue of limitations." 58 Comp. Gen. 501.

[5] Subsection (i) states: "The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31."

[6] *See United States v. Beck*, 758 F. 2d. 1553 (11th Cir. 1985); *United States v. Diaz*, 790 F. 2d 866 (11th Cir. 1986); *United States v. Skidmore, Owings & Merrill*, 505 F. Supp. 1101 (D.C.N.Y. 1981).

[7] 524 F. 2d. 799 (9th Cir. 1975).

> "(1) *Recovery* of an overpayment will *defeat the purpose* of the subchapter if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of the subchapter to the extent that:
>
> > "(a) The individual from whom recovery is sought needs substantially all of his/her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses.
> >
> > "(b) The individual's assets do not exceed the resource base of $3,000 for an individual or $5,000 for an individual with a spouse or one dependent, plus $600 for each additional dependent. This base includes all the claimant's assets not exempted from recoupment in (4) below. . . ."

The Office procedure manual then defines income and assets, stating:

> "*Income.* The individual's total income includes any funds which may reasonably be considered available for his/her use, regardless of the source. Income to a spouse will not be considered available to the individual unless the spouse was living in the household both at the time the overpayment was incurred and at the time waiver is considered."

* * *

> "*Assets.* An individual's assets include:
>
> > (a) Liquid Assets—cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and the like.
> >
> > (b) Non-liquid Assets—the fair market value of property such as a camper, second home, extra automobile, jewelry, etc.
>
> "Assets for these purposes do not include the value of household furnishings, wearing apparel, family automobile, burial

> plot or prepaid burial contract, a home which the person maintains as the principal family domicile, or income producing property if the income from such property has been included in comparing income and expenses." [8]

In the present case appellant's overpayment recovery questionnaire indicated that his monthly income was exceeded by his monthly expenses, and the Office does not contend that he does not need substantially all of his current income to meet current ordinary and necessary living expenses. The Office instead contends that appellant's assets exceed the resource base of $5,000 for an individual with a spouse. The definition of "assets" in the Office's procedure manual, when compared to appellant's overpayment recovery questionnaire and "Schedule of assets 6/1/84," shows that appellant exceeds this resource base only if his wife's certificates of deposit, acquired by the sale of her separate property and thus retaining the character of separate property under California law,[9] are included in appellant's assets.

The Board finds that the Office, in determining that appellant's assets exceed the resource base set forth in the Office's procedure manual, improperly included the separate property of his wife. The procedure manual states that a claimant's *income* includes any funds reasonably available and that this includes income of a spouse. However, the procedure manual does not contain a similar provision with regard to *assets*. There is a valid reason for this distinction. In determining whether a claimant needs "substantially all of his/her current income to meet current ordinary and necessary living expenses," his income is balanced against his expenses. If a claimant is married and living with his spouse, the expenses of both individuals must be considered as such expenses cannot reasonably be separated. Therefore, if a spouse's expenses are considered in the overall balance, likewise her income must be considered. This same reasoning, however, does not extend to a spouse's assets which are separately held and which are not normally considered reasonably available to meet ordinary and necessary living expenses. The Board notes that, in determining whether appellant needed substantially all of his income to meet his living expenses, the Office included the income produced by his wife's separate property including her certificates of deposit. The Board further notes that the Office could not recover appellant's overpayment from his spouse's separate property under California law or Board precedents.[10]

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[8] Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments (June 1985).

[9] *Thomasset v. Thomasset*, 121 Cal. App. 2d 116 (1954).

As appellant's assets do not exceed the resource base of $5,000 set forth in the Office's procedure manual and his income does not exceed his expenses, the Office abused its discretion by refusing to waive the overpayment of compensation on the evidence currently of record.

The decisions of the Office of Workers' Compensation Programs dated March 28, 1985 and August 28, 1985 are affirmed insofar as they found that the Office is not barred by the six-year period of limitations of 28 U.S.C. section 2415 from recovering an overpayment of compensation made more than six years before the Office determined there was an overpayment; insofar as these decisions refused to waive the overpayment of compensation in the amount of $32,677.75 they are reversed.[11]

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[10] *See Yolanda Librera*, 37 ECAB 388 (1986); *Marty Jocewicz*, 37 ECAB 233 (1985).

[11] Board's disposition of this case makes it unnecessary to determine whether the overpayment should be waived on the basis of detrimental reliance.

In the Matter of ERNEST TESORIERO *and* DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 88-619; Submitted on the Record;
Issued September 30, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant had any disability causally related to a March 24, 1978 employment injury on and after June 25, 1980, the date the Office of Workers' Compensation Programs terminated his compensation benefits; and (2) whether the Office properly refused to reimburse appellant for or pay his expenses incurred for chiropractic services rendered.

On March 24, 1978 appellant, a 52-year-old electrician, sustained an injury to his back while in the performance of duty. He stopped working on March 27, 1978 and has not returned.

Appellant was treated on March 27, 1978 by Dr. Edward Tufankjian, who diagnosed lumbar radiculopathy, secondary to herniated lumbar disc as causally related to the March 24, 1978 employment incident, and indicated that appellant was totally disabled for work. The record reveals that Dr. Tufankjian hospitalized appellant under the service of Dr. Carl Mogil, an osteopath, with a subspecialty in orthopedic surgery, and his associates Dr. Seymour G. Kaufman and Dr. I. David Weisband, who were both osteopaths, on April 8, 1978 for treatment of his low back pain, which radiated along the sciatic nerve. The doctors referred appellant to Dr. Bernard LaBove, an osteopath, for x-rays which were taken on April 12, 1978 and revealed a moderate degree of degenerative spondylosis. The doctors also arranged for Dr. Sherman M. Bannett, an osteopath and associate of Dr. LaBove, to perform a myelogram on April 13, 1978 which revealed L5, S1 extradural defect on the right, indicative of a herniated intervertebral disc. The record further reveals that appellant's electrocardiogram on admission revealed sinus tachycardia, right atrial hypertrophy and possible right ventricular hypertrophy with right bundle branch block.

Following the review of the various test results, the admitting physicians anticipated surgery for the "removal of the herniated nucleus pulposus," and referred appellant to Dr. Barney Slotkin, an osteopath, for consultation due to his elevated blood pressure. Dr. Slotkin prepared the hospital summary and noted his observations of appellant stating that at the time of consultation appellant's blood pressure was 156 over 100. Dr. Slotkin went on to discuss appellant's medical treatment during his hospitalization. Dr. Slotkin also reported that he began treating appellant for his hypertension and that appellant was ultimately referred to Dr. Robert Cohen, a neurosurgeon, who diagnosed right sciatic S1 radiculopathy with motor weakness and recommended surgery for the herniated nucleus pulposus. Although Dr. Slotkin reported that appellant "was stable until the day prior to surgery," his blood pressure rose to approximately 180 over 100 and he was placed on medication, which caused his pressure to drop to 110. Further, Dr. Slotkin stated that after appellant's blood pressure dropped, his medications were reduced; that, however, appellant stated that he was not feeling well as the medications "were making him sick and he did not feel well; that appellant had experienced "vague chest pain sensation and nausea; that he refused any medications; and that consequently his "blood pressure shot up to approximately 200 over 110" and he suffered from severe chest pain. Following this last elevation of appellant's blood pressure, and the onset of chest pain, Dr. Slotkin reported the following course of events:

"Electrocardiogram was performed and revealed some ST segment changes in the anterior wall that were different from his resting electrocardiogram. I saw the patient again at the request of the orthopedic department and the patient was stable. He continued to have chest pain and was medicated for the pain during the night. His blood pressure stabilized somewhat. He had a hypotensive response to Nitroglycerin sublingually. The patient's electrocardiogram on the following day revealed significant T wave inversions in the anterior wall, suggestive of acute ischemia or subendocardial infarction. At this point, the patient was transferred to the Coronary Care Unit and placed on the service of myself. He and the family were informed as it appeared as though the patient had had a heart attack. Serial cardiac enzymes were performed and revealed classical elevations of the enzymes consistent with an acute myocardial infarction. His HBD rose to a maximum of approximately 500. SGOT rose to approximately 120, the patient's isoenzymes revealed cardiac fraction to be present. The patient's studies prior to this episode revealed a normal SMA-12/60 and CBC as well as Pro-Time, PTT, spinal fluid studies were normal. The patient's CPKs at the time of the cardiac event rose to approximately 400 as well. His Pro-Time and PTT were normal. The patient's serial electrocardiograms revealed evolution of an anterolateral subendocardial myocardial infarction with right bundle branch block and right axis deviation. The patient did essentially well in the Intensive Care Unit. He was seen by Dr. Alexander Price from the Division of Cardiology at the family's request. Dr. Price felt also that the patient, without question, had had an acute anterolateral subendocardial myocardial infarction and recommended continued medical therapy as had been outlined. Dr. Price also noted the acute nitrate sensitivity with the patient and therefore nitrates were not given during the rest of his hospital stay. The patient was placed at rest and was quite uncomfortable because of the low back secondary to discogenic disease, but of course, surgery was impossible at this time.

"The patient gradually recovered from his infarction and for a period of three weeks remained in the hospital, slowly ambulating and improving. He was quite weak and lethargic and had a persistent tachycardia for approximately one week following his infarction. This came under control with low dose Inderal therapy and Lanoxin was administered for mild congestive heart failure subsequent to the infarction as well.

> "The patient's cardiac examination revealed the development of a mitral insufficiency which resolved as he improved. The patient's condition was quite satisfactory at the time of discharge, except of course, for his severe low back pain which will persist. He is anxious to have the surgery performed, but this cannot be done for a period of approximately three to five months if his recovery at home goes well. The patient is therefore being discharged to the outpatient care of Dr. Edward Tufankjian, his family physician, myself and the orthopedic department. . . . His blood pressures were in the range of 100 over 80 and the heart rate is 86 beats per minute. The patient is ambulatory with pain. His prognosis is good regarding his cardiac status and he will have to be watched very closely prior to the performance of laminectomy surgery."

A consultation report by Dr. Alexander Price, an osteopath, dated April 18, 1978, revealed that he saw appellant that day for an acute upper and mid anteroseptal myocardial infarction and a severe hypotensive response to the Nitroglycerine response sublingually. The doctor recommended that appellant not undergo any surgery for a period of three months.

Appellant was discharged on May 9, 1978 with diagnoses of lumbar discogenic disease-herniated disc and acute anterior wall myocardial infarction. The record further reveals that appellant was rehospitalized by Dr. Slotkin, for the period May 20, 1978 to May 25, 1978 with complaints of dyspnea and diaphoresis. He was discharged with diagnoses of acute coronary insufficiency, arteriosclerotic cardiovascular disease, and herniated nucleus pulposus.

Appellant continued under the care of Dr. Tufankjian for his back problems.

On August 9, 1978 appellant began treatments with Dr. Ronald C. Pluese, a chiropractor, consisting of chiropractic management therapy which he conducted three to four times per week. Dr. Pluese diagnosed appellant's condition as "an intervertebral disc syndrome grade 2, protrusion with radiculitis and parasthesias." He indicated that the diagnosis was causally related to the March 24, 1978 employment injury. The statement of treatment and expenses revealed, *inter alia*, that Dr. Pluese took x-rays of appellant's lumbar spine on August 9, 1978 at a cost of $60.00, and that he treated appellant by the use of "Chiropractic Management Therapy (to effect a freedom of nerve function in the areas of vertebral subluxations." The statement contained the diagnosis of "Intervertebral disc syndrome grade II, protrusion with radiculitis and parasthesias."

An Office of Workers' Compensation Programs medical adviser reviewed the record and suggested that the Office accept appellant's claim for lumbar strain and sprain. However, he further recommended that appellant, the case record, a statement of accepted facts and a list of questions, be referred to Dr. Robert R. Bachman, a Board-certified orthopedic surgeon, for a current and complete evaluation regarding whether appellant's current back condition is causally related to a March 24, 1978 employment injury, or to a preexisting nonwork-related condition; and if employment related, the period of any employment-related disability. The medical adviser recommended that the Office advise Dr. Bachman that appellant's "myocardial infarction has been a concurrent disability unrelated to the work." Additionally, the Office medical adviser concluded that appellant was not entitled to reimbursement of or payment for expenses incurred for chiropractic treatment administered by Dr. Pluese as he had not diagnosed a spinal subluxation as demonstrated by x-ray to exist.

Based on the Office medical adviser's recommendation, the Office referred appellant to Dr. Bachman. Dr. Bachman conducted his initial examination and review of the medical records on December 15, 1978. The doctor conducted a follow-up examination of appellant on December 28, 1978 and in a report of the same date concluded that x-ray findings corroborated the diagnosis of a herniated nucleus pulposus at L5–S1 on the right side. The doctor further concluded that appellant was disabled as a result since appellant's condition would preclude him from performing certain activities, especially the duties of an electrician.

The Office medical adviser reviewed the record and essentially concurred with Dr. Bachman's findings and conclusions. The medical adviser again concluded that "treatment under the care by chiropractor is not acceptable as subluxation of the vertebrae had not been confirmed by x-rays in the file."

The Office accepted appellant's claim for lumbar strain and sprain with radiculopathy resulting in herniated nucleus pulposus L5–S1 on the right, and paid him compensation benefits for temporary total disability commencing March 27, 1978. In a letter of March 6, 1979 the Office requested that appellant submit a rationalized medical opinion from his attending physician establishing periods of continued employment-related disability. Moreover, the Office advised appellant of the following:

> "[T]he Federal Employees' Compensation Act recognizes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. Since this is not the situation we are returning your bills from Dr. Pluese."

Appellant submitted a March 29, 1979 report by Dr. Tufankjian who reviewed the history of treatments he had administered to appellant. The doctor noted that surgery was discussed with appellant during his April 8, 1978 hospitalization for correction of his herniated nucleus pulposus; however, he also noted that surgery was cancelled due to his cardiac condition for which he was treated by Dr. Slotkin. Dr. Tufankjian went on to report that he last treated appellant on March 20, 1979 "at which time he had a positive straight leg raising test on the right with decreased deep tendon reflexes on the right lower extremity and pain on palpation over the lumbar paravertebral musculature." The doctor concluded that appellant "has been totally disabled because of the herniated lumbar disc and his acute coronary insufficiency."

Appellant also continued to submit attending physician's supplemental reports by Dr. Pluese containing the same diagnosis and description of treatment included in his previous reports.

The Office medical adviser concluded upon reviewing the record that the exact date for termination of disability of appellant's accepted back condition was not clear from the record. He recommended that Dr. Bachman reevaluate appellant. The medical adviser again concluded that appellant was not entitled to reimbursement of, or payment for, expenses incurred resulting from chiropractic services rendered by Dr. Pluese for the reasons mentioned previously.

By letter dated October 26, 1979 the Office notified appellant that he was not entitled to any compensation benefits subsequent to March 20, 1979 "As there is no medical evidence in file of disability beyond that date, except from a chiropractor. . . ."[1] The Office further notified appellant that Dr. Pluese's services were not authorized as he did not correct a spinal subluxation as demonstrated by x-ray to exist. The Office also terminated its authorization of treatment by Drs. Tufankjian and Mogil and authorized treatment by Dr. Bachman.

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[1] Appellant began receiving benefits administered by the Office of Personnel Management on a continuous basis beginning March 21, 1979

Dr. Bachman examined appellant on December 3, 1979 and in a report of the same date stated:

> "The physical examination reveals a normal gait and stance. The lumbar spine goes through an excellent range of motion without distress today. Trendelenburg sign is negative bilaterally. Motor power in the lower extremities is excellent. Reflexes and sensation to light touch are within normal limits. Straight leg raising is not remarkable. The hips are not remarkable. Pelvic compression is negative.
>
> "In summary, this gentleman is coming along nicely regarding disc disease of the lumbar spine. So long as his activities are limited by his heart condition, I have no concern for his back. He should simply continue with the lumbar flexion exercises on a daily basis and use his back support as needed for discomfort."

A second Office medical adviser reviewed the record on April 22, 1980-and stated that he could "find no definitive medical evidence to separate the disability from low back problem and concurrent unrelated cardiac condition." The medical adviser suggested that the Office request Dr. Bachman to address the following issues; whether appellant's current low back condition was related to the March 24, 1978 employment injury; whether appellant was either partially or totally disabled and whether such disability was due to either the back condition or the cardiac condition; and when the "total disability as related only to back problem," causally related to the March 24, 1978 employment injury ceased.

Accordingly, by letter of May 19, 1980 the Office sought clarification from Dr. Bachman regarding whether appellant's disability was causally related to the March 24, 1978 employment injury or to his preexisting heart condition, and if appellant's disability could no longer be attributed to work, when it ceased.

Dr. Bachman replied on June 25, 1980 stating the following:

> "1. On the basis of the patient's history, his orthopedic disability is related to the injury sustained on March 24, 1978.
>
> "2. On the basis of my records, it would seem that his total disability is not related to the orthopedic problem. This is based on review of my examination of December 3, 1979 at which time I thought he was coming along nicely regarding his disc disease.

> "At that time, one might consider him no longer permanently disabled regarding his low back. He would be considered, however, to be partially disabled at that time with some limitations. He was recommended the continuation of his back exercises and the back support, the latter as needed for sufficient distress.
>
> "Regarding the OWCP–5, I do not have this form. My examination revealed no permanent residual physical findings. The residuals are based on his statement which would be reasonable and taking into consideration his discogenic problem.
>
> "3. My only recommendations [at] this time are continued conservative management with limited duty as discussed previously."

The first Office medical adviser stated, after reviewing the record, that the exact date that appellant's employment-related disability ceased was unknown and recommended the Office request an opinion from Dr. Mogil requesting this information.

By letter of November 13, 1980 the Office requested that Dr. Mogil submit an opinion addressing the issues raised by the Office medical adviser. The Office advised Dr. Mogil that appellant also had a history of an acute subendocardial infarction which he sustained after his back injury which "cannot be considered in his disability determination."

Dr. Mogil replied in a November 28, 1980 report that appellant had sustained a herniated lumbar intervertebral disc on March 24, 1978 and that he "is totally disabled from all kinds of work as a result of the injury."

The first Office medical adviser again reviewed the record on March 30, 1981 and concluded that appellant's total disability ceased by December 28, 1978 based on the reports submitted by Dr. Bachman dated December 28, 1978, December 3, 1979 and June 25, 1980; that on December 3, 1979 Dr. Bachman stated appellant was partially disabled; and that on June 25, 1980 appellant was capable of light duty. The medical adviser added that Dr. Mogil did not provide any medical rationale in his November 28, 1980 report supporting continuing employment-related disability, and noted that Dr. Pluese's reports were insufficient to support the claim. He concluded, therefore, that the weight of the medical evidence rested with Dr. Bachman.

In letters dated February 5, 1987, March 18, 1987, and May 7, 1987, the Office requested that appellant submit additional medical evidence in support of his claim for continuing employment-related disability and advised him that the most recent report was dated in 1980. In a July 29, 1987 letter the Office allotted appellant 15 days within which to submit the necessary information.

Appellant submitted an August 24, 1987 attending physician's supplemental report by Dr. Tufankjian who diagnosed lumbar radiculopathy secondary to a herniated lumbar disc and indicated by checking the box marked "No" that it was not causally related to the March 24, 1978 employment injury.

By compensation order dated November 10, 1987, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim for compensation benefits after June 25, 1980 on the ground that "There is no well-reasoned medical opinion in file supporting any work-related disability after that date." The Office further found that "The chiropractic treatment rendered by Dr. Pluese is also denied because the services rendered do not fall within the Federal Employees' Compensation Act guidelines for chiropractic treatment." In the accompanying memorandum the Office determined that appellant was entitled to compensation benefits for temporary total disability for the period March 2, 1979 to June 25, 1980, and that Dr. Pluese's services were not reimbursable as his treatment did not consist of manual manipulation of a spinal subluxation as demonstrated by x-ray to exist.

The Board finds that the case is not in posture for decision and must be remanded for further medical development.

The basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an intervening cause attributed to the claimant's own intentional conduct.[2]

The Office accepted appellant's claim for lumbar strain and sprain with radiculopathy resulting in a herniated nucleus pulposus at L5–S1 on the right. Dr. Tufankjian, appellant's attending physician, hospitalized appellant on April 8, 1978 under the service of Drs. Kaufman and Weisband, osteopaths, for treatment of his low back pain. During and following a battery of diagnostic testing, appellant's blood pressure became elevated. Since the admitting physicians had contemplated surgical intervention for the herniated nucleus pulposus, they referred appellant to Dr. Slotkin, an osteopath, and charged him to monitor appellant's blood pressure. Dr. Slotkin reported that appellant's blood pressure was stable until the day prior to the scheduled surgery when it became elevated. Ultimately, appellant also experienced severe chest pain, which accompanied his elevated blood pressure. Consequently, these symptoms culminated in the anterolateral subendocardial myocardial infarction with right bundle branch block and right axis deviation. Upon discharge from the hospital on May 9, 1978 Dr. Price, an osteopath, recommended that surgery for the herniated nucleus pulposus be delayed for at least three months.

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[2] *Gaeten F. Valenza*, 35 ECAB 763 (1983); *Jimmie D. Brewer*, 35 ECAB 197 (1983).

Dr. Bachman, the Board certified orthopedic surgeon to whom the Office referred appellant, reported on December 28, 1978 that appellant was totally disabled for work as a result of his herniated nucleus pulposus at L5-S1 on the right. The doctor reported on December 3, 1979 that physical examination of appellant was normal and concluded that appellant "is coming along nicely regarding disc disease of the lumbar spine." The doctor further concluded that "so long as his activities are limited by his heart condition, [he had] no concern for his back." A second Office medical adviser reviewed the record on April 22, 1980 and stated that he could "find no definitive medical evidence to separate the disability from low back problem and concurrent unrelated cardiac condition." He then recommended that the Office have Dr. Bachman discuss the issues of, *inter alia*, whether appellant's low back condition was causally related to the March 24, 1978 employment injury, whether appellant was totally or partially disabled and whether the disability could be attributed to either the back condition or the cardiac condition.

The Board finds that Dr. Bachman's supplemental report of June 25, 1980 did not serve to clarify his prior report as it contained inconsistencies and ambiguities with respect to whether appellant had any disability causally related to the March 24, 1978 employment injury. In that regard, Dr. Bachman concluded that appellant's "total disability is not related to the orthopedic problem" and explained that he based his conclusion on his December 3, 1979 examination "at which time I thought he was coming along nicely regarding his disc disease." The doctor stated that as of December 3, 1979 appellant was "no longer permanently disabled regarding his low back," but instead would be deemed as partially disabled "with some limitations." The doctor then recommended appellant continue with back exercises and back support. The Board finds that it is unclear whether Dr. Bachman is attributing appellant's partial disability to his heart condition discussed in his December 3, 1979 report, or to appellant's employment-related back condition which the doctor reported that the December 3, 1979 examination revealed "no permanent residual physical findings." Nevertheless, the Board notes that despite the fact Dr. Bachman concluded there were "no permanent residual physical findings," he added that appellant's "residuals are based on his statement which would be reasonable and taking into consideration his discogenic problem." This statement implies that appellant continues to suffer from his employment-related back condition despite Dr. Bachman's conclusion that appellant's disability was unrelated to an orthopedic problem.

The Board notes that although Dr. Bachman was requested to address the issue of whether appellant had any disability causally related to the back condition or the cardiac condition, he failed to specifically address this issue. This issue is a crucial aspect of appellant's claim which needs to be addressed in light of the fact that appellant suffered a myocardial infarction when he was hospitalized for treatment of his accepted back condition.

The Board has held that where treatment rendered for a non-work-connected condition is rendered while the person is hospitalized for a work-connected disabling condition, adverse results are compensable.[3]

Since appellant's myocardial infarction had its onset while appellant was hospitalized for his employment-related back condition, and his activities were subsequently limited therefrom, the Board finds that the Office should have further developed this aspect of appellant's case. Although the Office requested Dr. Bachman to discuss whether appellant had any disability causally related to his cardiac condition, the Office neglected to fully apprise the doctor of the facts and circumstances surrounding the myocardial infarction *i.e.*, the fact that it occurred while appellant was hospitalized for treatment of his employment-related condition. Moreover, prior to its referral to Dr. Bachman, the Office did not investigate the onset of appellant's myocardial infarction other than to note the account in the hospital records and to conclude, without any factual or medical basis, that it was nonemployment related.

Accordingly, the case is remanded to the Office for further investigation as to whether appellant's myocardial infarction, which occurred during appellant's hospitalization for an employment-related back injury and resulted in the treatment of the cardiac condition while appellant remained hospitalized and thereafter, was a consequential injury. The Office shall prepare a detailed statement of accepted facts which shall include a description of the onset of the symptoms which culminated in the myocardial infarction and subsequent treatment therefor, as well as the facts and circumstances surrounding the March 24, 1978 employment injury. The Office shall refer the statement of accepted facts, together with appellant and the case record to a Board-certified cardiologist, for a rationalized medical opinion as to whether appellant's myocardial infarction was a consequential injury related to the March 24, 1978 employment injury, whether appellant was disabled for work as a result, and when such disability ceased. Should the Office determine there is such a relationship, it must pay related expenses.[4] The Office shall also refer appellant to a Board-certified orthopedic surgeon or other appropriate specialist, for a rationalized medical opinion as to whether appellant's current back condition is causally related to the March 24, 1978 employment injury; whether it is temporary or permanent; and if temporary, when it ceased. Following this and such further development as the Office deems necessary, a *de novo* decision shall be issued.

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[3] *See Douglas P. Rahm*, 12 ECAB 498 (1961); *Melvin D. Dombach*, 8 ECAB 389 (1955); *John Myers*, 6 ECAB 660 (1954).

With respect to the second issue, the Board finds that in view of its disposition of the case, there is no necessity to adjudicate the second issue on the present appeal. However, to preserve appellant's right to appeal, on remand the Office's *de novo* decision shall be on all aspects of appellant's claim.

The decision of the Office of Workers' Compensation Programs, dated November 10, 1987, is hereby set aside. The case is remanded for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

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[4] *Id.*